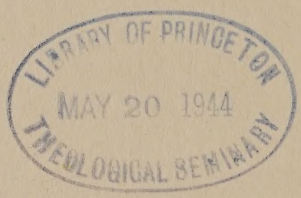

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THE JURISPRUDENCE OF THE JEWISH COURTS IN EGYPT

LEGAL ADMINISTRATION BY THE JEWS UNDER THE EARLY ROMAN EMPIRE

AS DESCRIBED BY PHILO JUDAEUS

BY ERWIN R. GOODENOUGH, D.PHIL. (OXON.)
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MICHAEL ROSTOVTZEFF

ERUDITISSIMO · BENIGNISSIMO

Ein weiteres noch viel zu wenig durchforschtes Kapitel für sich bildet dann das jüdisch-talmudische Recht und die Möglichkeit seiner Beziehungen zum hellenistischen und römischen Recht.

Leopold Wenger 1927

PREFACE

THE ensuing study had its origin in chance. A year ago I began organizing my material to write a study of the Nomos of Philo in its philosophical and religious sense, and found that I had several notes, largely of passages pointed out by Heinemann, where Philo seemed to evince an expert knowledge of practical law. Having been long convinced that Philo's life had not been predominantly devoted to mystical philosophy, but had been actively concerned with the administration of Jewish society in Alexandria, I checked these passages with a view to calling attention to them in a few pages introductory to the larger study I was beginning. But one passage suggested another until I saw that there was much more material of the sort than I had suspected, and so I stopped to re-read the De Specialibus Legibus from the point of view of a lawyer. The following monograph is the result of what I found. In handling questions of law no one can be more keenly conscious than myself of my lack of legal training. Any maid in Pilate's court will recognize in my speech the crude accent of Galilee; and Greek lawyers will find the Socratic irony literally true of me: ἀτεχνῶς οὖν ξένως ἔχω τῆς ἐνθάδε λέξεως. Yet I felt that my understanding of ancient law, got up as it was de novo for this study, was sufficient to make me able at once to recognize a practical lawyer in Philo, and to point out enough of his legalism at least to induce competent legists to read him after me. It seemed plain that here was law, in a place where lawyers never tread, and that only such as I would ever call it to their attention. If my book succeeds in filling this modest aspiration, I shall be quite content.

The relation to rabbinical tradition of the law which Philo describes it has been quite beyond my power to indicate. Obviously what we have here is itself a rabbinical tradition of Alexandria which was inspired in many of its developments by Greek and Roman practices, but which also must have been constantly influenced by legal tradition from Palestine. Yet the written sources of that tradition are distinctly later than Philo, and may resemble in points the Philonic law because Palestinian rabbis themselves worked under a Roman rulership which forced them to render to Caesar the things which Caesar claimed as belonging to his jurisdiction. The formal recognition of this necessity, it is true, was so far as we know first made a century and a half after Philo's time by Samuel of Nehardea in his great formula, "The law of the government is law." But though the effect of Roman domination must have been felt in Palestinian law long before Samuel's time, all of this field, even since Professor George F. Moore's great work, is still too difficult for an amateur to express premature judgments. I have had the great privilege of discussing the subject with Rabbi Sidney Tedesche of New Haven, who has read the book and made many valuable suggestions. I can only express the wish that he himself might find time to make the larger study to which this work of mine must seem only a prolegomenon to any learned Jew.

Several other scholars have kindly read the book in manuscript. Professors George E. Woodbine, Austin M. Harmon, Frank Porter, and Kenneth Scott, of Yale, and Professor William Ferguson of Harvard, have pointed out many errors and much overlooked material. But most

of all I am indebted throughout this study, as constantly during the last four years, to Professor Rostovtzeff. His great learning and inspiring enthusiasm for antiquity have made deep impression upon all the world, but it is for one who has worked with him as a junior colleague to know in a peculiar way the kindliness with which he puts his knowledge and himself at the disposal of anyone who comes to him for guidance.

E. R. G.

New Haven, Conn.
March, 1929.

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JEWISH JURISPRUDENCE IN EGYPT

I

INTRODUCTION

RECENT interest in the Jewish community in Alexandria seems thus far not to have led to a reexamination of the writings of the greatest member of that community. The reason for the neglect is not far to seek. Philo Judaeus Alexandrinus speaks a language deeply repellent to most modern historians, and even those who read him with sympathy for his metaphysics and mysticism see little else in his writings. But it seems that in spite of the obvious faults of Philo the blame for such an estrangement is ours as much as his. For if we have patience he has a very great deal to tell us.

In the interpretation of Philo we must always bear in mind the familiar line of *Hamlet* with which nearly a century ago Gfrörer characterized Philo's writings, "Though this be madness, yet there's method in it." The application of the line to Philo was nothing short of brilliant, for it not only accurately characterized his thought, but gave a suggestion as to the right way in which we may come to understand him.

The "method" of Philo is not to be understood as method in the sense of modern scholars. So Siegfried[1] seemed to have understood it when he tried to draw up rules and categories to describe different exegetical techniques which Philo apparently used. I quite agree with Bentwich[2] that Philo will reveal no secrets to so unsympathetic a treatment. He was too great and free a spirit

[1] Carl Siegfried, *Philo von Alexandria als Ausleger des alten Testaments*, Jena, 1875.

[2] Norman Bentwich, *Philo-Judaeus of Alexandria* (Philadelphia, 1910), p. 101.

to be brought back by rule-of-thumb. Rather must we constantly remember that if he seems often to relapse into uncontrolled allegorical mazes he always has a definite purpose in what he is writing, the purpose of squaring the letter of the Scriptures with the Alexandrine thought of his generation. Usually it is Alexandrine idealism which he is reading back into the Written Word, but often it is Alexandrine ethics, or just plain common sense. Those who approach Philo from the point of view of the exegete will never understand him, in spite of the fact that his work usually took the form of scriptural commentary. We are puzzled by his writing because it is a reverse picture of his actual thinking, and we must learn to read him in a mirror.

For Philo's difficulty lay not in his being narrow, but in his many-sidedness. His problem was how to find room for his multifarious interests, and while reading his writings we must always recall that in Philo we have one who was intimately in touch with all aspects of the teeming life of Alexandria. In spite of the preoccupation with metaphysics in his writings, he was the habitué of the theaters, the games, and the banquets of Alexandria. He was a critical observer of the athletics of the day, and speaks with almost an expert's insight about contests he has seen where the victor was not the most skilful boxer, but the man who was in better physical training, as we would say, to "take punishment."[3] He tells of being at chariot races where excitement ran so high that some of the spectators rushed into the course and were killed.[4] He describes the enthusiasm of the crowd at a now lost play of Euripides when some brilliant lines in praise of free-

[3] *Quod Omnis Probus Liber Sit*, 26.

[4] Frag. in Eusebius, *Praeparat. Evang.*, VIII, 14, 58; cf. *De Provid.*, II, 107.

dom were recited.[5] At the theater, too, he has "often" noticed how differently music affects different people, the same tune moving some to exclamations of praise, leaving others unmoved, and driving still others out of the theater altogether in disgust with their fingers stopping their ears.[6] When he attended banquets he had to watch himself carefully, "take reason along" as he expresses it, or, as frequently happened, he would become a helpless slave to the pleasures of food and drink. With what satisfaction he recalls the banquets he attended where he did *not* thus lose control of himself![7]

This Philo is never completely submerged in the mystic. Again and again his remarks, even when he is busy with the most artificial allegory, are colored by his general experiences. And yet the appeal of asceticism to him was tremendous, so that his "better side," as he would have regarded it, seemed always to be calling him out from this free association with men.

Here is one, but only one, of Philo's many conflicts. On the one hand he is an active sharer in all life's vicissitudes, but on the other hand he decries all the vicissitudes of life as hampering its true aim. The mystic in Philo condemns his everyday life. Yet he does not seek peace by renouncing either part of his self-conflicting nature. If he wants to run away from the struggle to the desert, he never stays there. If he speaks sometimes with horror of his lower nature, he will never rule it completely out of court. He speaks often in terms that suggest Paul's crucifixion of the flesh, but if at times that seems the best way out of his difficulty he does not consistently take it. Philo's working philosophy must have been rather control than destruction of his appetites. His

[5] *Quod Omnis Probus Liber Sit*, 141.
[6] *De Ebrietat.*, 177.
[7] *Leg. All.*, III, 155 f.

reason must rule the flesh, not stifle it. For a man who is really strongly drawn by both desire and asceticism such a solution entails a most difficult balancing, and an almost constant sense of failure. Throughout his writings only Philo's courage seems greater than his appreciation of the difficulty of his course, though here and there passages occur where he seems singing a chant of victory.

Another conflict in his nature, and the one on the whole most important for the interpretation of his writings, lay between his loyalty to Judaism, even to the letter of the Torah, and his probably unconscious but profound conviction that Judaism was quite inadequate in the light of Greek philosophical teachings.[8] But so deep was his loyalty to the one that he refused to allow himself to recognize the deficiencies pointed out by the other, and so most of his writing is dedicated to rationalizing their irreconcilability. The profundity of Judaism's hold upon a Jew is almost incomprehensible to us Gentiles, even since Feuchtwanger's magnificent exposition of it in his *Jud Süss*, and Philo never for a moment got away from it, but accepted with it the Scriptures in their every detail. Yet at the same time he accepted as the final word of Truth the explanation of nature and life given by the philosophical mysticism and idealism of the Hellenistic age. The very extent of the ramifications of his laborious insistance that the two were ultimately identical in purpose is itself the best evidence of the crucial importance which their reconciliation meant for his happiness and inner harmony. Other solutions than Philo's there were at hand. In Palestine strict Jews tried to shut out every aspect of Greek civilization, especially after the Maccabaean re-

[8] Of commentators on Philo the nearest to recognizing the significance of this conflict is Dr. E. R. Bevan, in his article "Hellenistic Judaism" in *The Legacy of Israel*, Oxford, 1927.

volt, so that a rabbinical tradition was already beginning by Philo's time that centered the attention of its exponents closely upon native Jewish, or at least long-assimilated Semitic, material and ideas. In the Diaspora many, like Philo's own nephew, took the other path and renounced the traditions of their fathers to live the lives of Hellenists altogether. But unlike either of these Philo seems to represent a large part of the Jews of the Diaspora in solving the problem by a hot welding of the two appeals. They, probably, like Philo, while they clung to their Jewish practices and customs, magnificently denied the anthropomorphism and childishness which they said was only a superficial aspect of the Pentateuch, and asserted that the Scriptures on examination revealed the highest truths of Hellenistic metaphysics. Indeed no Greek philosopher, they insisted, had ever achieved the heights and depths opened up in the writings of Moses. Their very fears and doubts they thus drowned in counter-attack, which became an active and apparently successful missionary propaganda. Yet their argument is throughout a rationalization of their own inner conflict; for when harassed by conflicting ideas which can neither be ignored nor adjusted to each other, the mind is always driven to some sort of specious rationalization, which tends to become increasingly bizarre.

And so the technique, if such it may be called, by which one may hope to understand Philo fully must be quite similar to the technique of the psychiatrist who tries to find in a distraught person's conversation that real problem the struggle with which is distorting the patient's nervous or mental system. More and more it is becoming a truism that, except in cases of organic disorder, madness always has a "method," and that the discovery of that "method" is the longest possible step toward a cure.

Fortunately, much of the bizarre as is to be found in Philo's writings, he is very far indeed from being mad, so that the "method" he is using is easily discoverable.

On such a basis one would infer from Philo's struggle to reconcile Judaism with eclectic Greek philosophy that his conflict is between two realities equally objective to his own thinking. For clouds of imaginations and cliffs of reality may have dramatic conflicts in the mind of an introvert, but not in the mind of one who, like Philo, finds his solution in grasping straws from the world outside and about him. In spite of the bizarre quality of Philo's reasoning, in spite of his mysticism, he is not inventing problems. Clouds there are in abundance in Philo's writing; but they are clouds of dust from the clash of two cliffs. The civilization and point of view of Israel crashed within Philo's mind against the civilization and aspirations of the Greeks, so that the bizarre cumuli of his remarks must always be regarded as made up of the shattered, but usually recognizable, fragments of these two civilizations, rather than as the product of his own creative imagination. To change the figure, his writings are patch-mosaics of the fragments left by the crash of Judaism and Hellenism. Philo himself seems to have contributed only a deep emotional loyalty to each, and a real understanding of their distinct values, together with a sincerity of purpose and an extraordinary ingenuity in trying to make a single pattern out of their fragments. But very little of the material he is arranging has come from his own mind. So if in Philo's writings there is to be found, as opposed to Judaism, a body of Greek eclectic idealistic teaching, that eclectic idealism and mystical philosophy must have had as real an existence independent of his own thought life as did his Judaism.

Similarly the conflict between "fundamentalism" and

modern science which for the last forty years has been driving many great minds to the bizarre in an attempt at reconciliation, is really the conflict between two orthodoxies.[9] The modern "liberal" theologian is most apt to be the counterpart of Philo in making a bizarre mosaic from the fragments of two views of life which, having come to him from the outside, crash together in his mind. Such a man will not only know the principles of his religious tradition, but must also be well informed about the principles of modern science, if not in its technicalities. For in trying to reconcile historical Christianity with science the modern apologist is aware that his reconciliation will only be valid in so far as he can be true to the essential points in the teachings of both the conflicting orthodoxies. So, if he is a man of intellect comparable to Philo's, he will make himself well informed about both. The result is that two thousand years from now he will of course be a source for the historian's description of the religious conceptions of our generation, but in the absence of other evidence he will also be a most important source for the teachings of both the orthodoxies he is jug-

[9] One instance of so familiar a phenomenon will be sufficient. In an article, "Jesus in the Light of Parthenogenesis" in the *Methodist Review*, CVI (1923), 888-898, Professor William J. Thompson, an honored member of the faculty of Drew University, tries to strengthen his faith in the Virgin Birth by dealing with it, as the editor explains, "from the biological standpoint." A sample of his argument is the following: "Agents which have been used to effect parthenogenesis are: salt solutions of acid, fatty acids and fat solvents of alkaloids and cyanides, blood serum and sperm extract, heat and cold, agitation and electrical current. Is not the Spirit such?" But in attempting to justify their loyalty to traditional religious beliefs many of our greatest scientists have been scarcely less bizarre. I cannot resist quoting from the recent book of the great physicist Professor R. A. Millikan, *Evolution in Science and Religion*, 1928, pp. 82 f.: "The idea that nature is at bottom benevolent has now become well-nigh universal. It is a contribution of science to religion, and a powerful extension or modification of the idea that Jesus had seen so clearly and preached so persistently. The practical preaching of modern science is extraordinarily like the preaching of Jesus" [abridged].

gling. From the fact that the apologist is thus contorted in his struggle to hold true to two systems of ideas it could be concluded by the future historian that while the contortions themselves may be the apologist's own contribution, he is yet by his very contortion witness to his passionate determination to be true to science, as well as to Christianity, as he learned both from objective sources. That is, the future historian would rightly feel that he could conclude from the writings of the perhaps bizarre apologist that the educated world of that apologist accepted as a body a group of ideas which conflicted with the religious traditions of the past, and that a fairly good idea of these scientific commonplaces could be gathered from the apologist's writings.

If I am correct in feeling that there is a sound analogy between the psychology of Philo and that of a modern "liberal" theologian, one is led to the conclusion that much more importance should be given to his writing as testimony to the thought life of his age in general, or at least to the thought life of intelligent Alexandria, than is usually done. The mystical idealism of Philo was as objectively real a description of Truth to him as his Judaism. Eclecticism, or Neo-Platonic Neo-Pythagorean Stoicism, or whatever it should be termed, was in a much more developed stage in Philo's day than is usually admitted.

Such, at least, is a manner of approaching Philo, a hypothetical possibility in interpretation, which might well be tested out before it is rejected.

The application of such a hypothesis to Philo's writings in general is not the purpose of the present study; but the sense of objective reality in the material making up Philo's data has led me, in respect to one of his less

conspicuous "conflicts," to come to conclusions which are, if sound, of considerable importance.

I have recently called attention to the fact that Philo was apparently a practical political administrator of some kind during much of his life.[10] From the material discussed in that connection it appeared that far from having been a philosophical and mystical recluse throughout his life Philo had felt obliged to answer the call of his countrymen and spend his years in public office. Philo the mystic cried out in agony against this horrible imprisonment in practical affairs.[11] But it is interesting that the very cry for liberation which I formerly discussed is made from the midst of a great exposition of the laws of the Jews, the *De Specialibus Legibus*, and it is striking that it occurs just at the place where Philo, having finished the discussion of more typically Jewish laws, turns to the section of criminal law and civil law in general. Is there something about this particular subject which prompts Philo, as nothing else in his writing does, to cry out against his being compelled to devote most of his time to public matters? The immediate answer is that Philo, having to devote his active working time to practical legislation, kept his time of writing and study for his beloved metaphysical mysticism. Now he cries out in protest because he must turn to expound in writing a body, or the body, of laws which he associated with his active life. If I am right in thinking of Philo's conflicts as arising from his attempt to adjust himself to objective realities, and if it was the nature of the material then under discussion

[10] "Philo and Public Life," in *The Journal of Egyptian Archeology*, XII (1926), 77-79.

[11] *Spec. Legg.*, III, 1 ff. Perhaps the statement, "Why then should we strut because we have fastened power to ourselves in the gay colored political state like a costly garment?" is also to be taken as a reference to Philo's personal position (*De Somniis*, I, 224).

which drove him to cry out thus magnificently against the conflict, does it perhaps follow that the material itself had this objective reality, and that the laws as he expounds them are the laws he daily administered in his hated duties? At least it is a suggestion worth checking, and can be checked only by a careful examination of the laws themselves. It is the purpose of the present essay to make such an examination of the *De Specialibus Legibus*, in the belief that it will appear at least highly probable that the laws there recorded correspond very closely to the jurisprudence of the Jewish Courts of Law in Egypt.

The four books *De Specialibus Legibus* are themselves part of a larger undertaking. For one of the great divisions of Philo's writings is that which Massebieau called "The Exposition of the Law."[12] It had for its purpose the explanation of how the Torah was the supreme written code known to mankind, because it stood closer than any other to the Law of Nature which was the Law, or Logos, of God. To prove this rationalizing thesis to thoughtful Jews and sympathetic Gentiles, he wrote a remarkable series of books which began, naturally, with a treatise on creation, the *De Opificio Mundi*, where he discussed the nature and function of the cosmic Logos-Nomos. He then proceeded to show that this Law, after man's creation and fall, was still revealed to men, revealed at first in the mystic persons of the patriarchs, whom he explains as incarnations of the Law, *νόμοι ἔμψυχοι*, that is in terminology which I have shown to have had its objective reality in the current Hellenistic philosophy of monarchs.[13]

[12] Philo most clearly outlines his great undertaking in *De Praem. et Poen.*, 1-3. See Massebieau, "Le Classement des oeuvres de Philon," in *Bibliothèque de l'École pratique des Hautes Études, Sect. des sciences relig.*, 1889, pp. 1-91.

[13] "The Political Philosophy of Hellenistic Kingship" in *Yale Classical Studies* (1928), I, 51-103.

The influence of these patriarchs, he believed, was profound and salutary for the entire race,[14] and so their careers were sketched from this point of view in a series of treatises. The still extant *De Abrahamo* was originally followed by *De Isaaco* and *De Jacobo*, both of which were lost before the time of Eusebius; then came the still preserved *De Josepho*. Moses was omitted, probably because the extant treatise *De Vita Mosis* had been written at some earlier time with another purpose, but seemed to him on the whole still adequate to fill any gap for the reader.[15] But Philo believed that God in his goodness did not stop with the revelation of the Law made in the persons of the patriarchs, but went on to give men a more definite and easily understood codification of the Law. First, without the use of any mediator, God revealed the Decalogue, which is the Law of God and Nature as reduced to principles by God himself. This part of the Law was revealed directly to the entire human race, and only afterward written down. The remarkable process of its revelation, and an exposition of the Decalogue itself, constitute the body of the *De Decalogo*. But still weak men needed more specific guidance than that given in the Ten Commandments, so Moses was empowered by divine inspiration, in the character again of Incarnation of the Law, to use the Decalogue as a set of legal principles from which he deduced the entire body of those specific laws for which Judaism has always been famous.[16] Under the title περὶ τῶν ἐν μέρει διαταγμάτων, *De Specialibus Legibus*, Philo accordingly devotes four books to the dis-

[14] For example, *Spec. Legg.*, IV, 181.

[15] So he refers to the work in *De Virtut.*, 52.

[16] Philo ordinarily calls the Ten Commandments νόμοι, but in classic Greek the distinction he has in mind would have been made by calling these Commandments θεσμοί, and only the individual statutes, νόμοι. This distinction in terms had been lost by Philo's time. See Rud. Hirzel, *Themis, Dike, und Verwandtes*, 1907, pp. 338 f.

cussion of this body of laws, of which each part is assigned to one of the Ten Commandments as its justifying legal principle.

It is at this point, when he comes to the discussion of the laws individually, that I have been impressed with the fact that we have a very valuable record of much of the law used by Jews in their Jewish courts in Alexandria. It is the same body of law as that with which he endeavored on other occasions to soar by allegory to heights supremely above the concerns of mankind. But in this case it is that law how differently regarded! While Philo wanted the Jewish law literally obeyed, he seems in his more familiar moods chiefly concerned in using it line by line as a series of springboards from which to leap up into the ether of Greek philosophy and mysticism. But here, much as he regrets the necessity, the other Philo is speaking, that Philo who so won the confidence of his compatriots by his practical sagacity in administration that they sent him at the head of their embassy to Rome when their very existence seemed to depend upon the success of the mission. Such a Philo, in writing this treatise to demonstrate the equity of the Jewish law as he knew it in the courts, has recourse to allegory only when he encounters a difficulty, such as the necessity of explaining away a bit of legislation found in the Scriptures but not enforced in his courts, or of justifying the inclusion of new laws as of equal authority with those in the original record, or, more commonly, of defending a Jewish law still used by the Jewish courts, though the law did not square with the practice of his neighbors. So the exposition, in spite of its artificial classification of all legislation as derived from the Decalogue, moves along in what is for Philo a fairly straightforward legal discussion.

But not only does Philo reveal a manner of treatment

of the Scripture different from what is usually associated with his name; he reveals at the same time a profundity of legal knowledge and training which has not heretofore been sufficiently noticed. A few instances only will be given here. He says that certain Greek legislators forbid the acceptance of hearsay testimony, where he refers to a regular provision of the Attic law.[17] Again he tells of a custom of many well-lawed cities that a man of evil repute may not speak in the public assemblies or council, but must get some good man to speak for him, a reference to a custom of Sparta.[18] Again he says that some law-givers forbid the execution of pregnant women until after their delivery, a custom which Heinemann has identified as common to Greeks, Egyptians, and Romans.[19] Philo is aware of the distinction that while Attic law allowed a man to marry his half-sister when the common parent was the father, Spartans allowed such a marriage only when the common parent was the mother.[20]

Such instances could be multiplied, but will appear in the course of the essay. In themselves they prove only that Philo had some scattered information about laws. A demonstration that the laws as expounded by Philo are the laws of the Jewish courts in Alexandria must not be content with pointing out Philo's legal knowledge, but must

[17] *Spec. Legg.*, IV, 61; *Quaest. in Exod.*, II, 9; Harris, *Fragments of Philo*, p. 51. Compare Justus Hermann Lipsius, *Das attische Recht und Rechtsverfahren unter Benutzung des attischen Prozesses von M. H. E. Meier und G. F. Schömann dargestellt* (hereafter abbreviated as Lipsius, *Attisches Recht*), 1905-1915, p. 436; and I. Heinemann in *Die Werke Philos von Alexandria* (hereafter abbreviated *Werke*) *ad loc.* Cf. Yad ha-Hazakah, *Edut*, XVII, 1, *in re* exclusion of hearsay evidence.

[18] *Quod Det. Pot. Insid.*, 134. See Plutarch, *Praecepta ger. reipub.*, 4, p. 801b; and *De audiendo*, 7, p. 41b. From Leisegang in Philo's *Werke*, III, 318, n. 1. Cf. moral qualifications of witnesses in Jewish law: "A wicked man is unfit to testify" (Sanhedrin, iii, 3, based on Exod. 23. 1).

[19] *De Virtutibus*, 137, see *Werke*, *ad loc.*

[20] See below, p. 83.

prove that the Jewish law as he reports it was practicable in, and itself impressed with the legal practice of, the Alexandria of his day. It will appear upon examination that what Philo is doing throughout, especially in matters of civil and criminal law, is to rephrase the prescriptions of the Torah, reinterpret them, or even alter them or deny them in a literal sense altogether, so that in the end Jewish laws resemble now a law of Rome, now one of Greece, or again one of the few laws we still have from Alexandria herself. This much can clearly be proved. We ask ourselves, then, what of it? Why should he have gone to all this trouble thus to rebuild the whole structure of Jewish law upon a foundation of Greek, Roman, and Alexandrine jurisprudence? No Jewish rabbi that I have ever heard of has cared to make such an interpretation of his law. He may have pointed out occasional similarities between his law and that of Rome or Germany. But he did not, like Philo, go so far as systematically to alter the sense or even text of his Jewish law in order to affect a comprehensive agreement with a foreign jurisprudence. Considering Philo's loyalty to the Written Word we can account for his having done precisely this only by his having been driven to do so by some great conflict between his Torah and that other body of laws to which he is making the Torah conform. As shown by the cry of horror with which he reacts from the task, and as revealed by the nature of the exposition itself, the re-writing of the Torah was not an academic amusement, but the product of necessity. And as the reinterpretation of the Torah to conform to Greek metaphysics was the result of external philosophical pressure, so this restatement of the practical aspects of the law to conform to the practical penalties and processes of foreign jurisprudence could have come only from an external necessity.

The situation where such a practical necessity would have arisen is not far to seek, for it must have been the daily problem of the Jewish courts in Egypt, where for generations Jewish jurists had had to reconcile their loyalty to the law of Moses with the practical necessity of keeping Jews from violating the fundamental legal principles of their fellow citizens. The exact status of the Jews in Alexandria is a point which has recently been much discussed. From early times at Alexandria the Jews had constituted a distinct πολίτευμα,[21] but this word is itself open to several interpretations. The Jews were called, or called themselves, Ἀλεξανδρεῖς,[22] but was it their right to do so? They had ἰσομοιρία and ἰσοπολιτεία with Greek Alexandrians, were of ἴσης τιμῆς with Macedonians;[23] they had a place of deposit of their own (ἀρχεῖον) for official records.[24] Yet the significance of all these facts is in dispute. And what the status of the Jewish colony in Alexandria was under Roman government is still less easy to determine. It is known from Josephus that Julius Caesar set up in Alexandria a stele of bronze on which it was published that the Jews had certain privileges in the city, specifically the privilege of citizenship.[25] But again we have a term which only adds perplexity, for the Jews could certainly not have been citizens of the Greek Alexandrian πολίτευμα, since that would have involved sharing in the city religion. The explanation on

[21] *Ps. Arist.*, 310; see H. I. Bell, *Juden und Griechen in römischen Alexandreia*, 1926, pp. 11 ff.; Leo Fuchs, *Die Juden Ägyptens*, 1924, pp. 80-100, esp. 89 ff.

[22] Philo, *Legat.*, 183; cf. Engers, ΠΟΛΙΤΕΥΜΑ, in *Mnemosyne*, LIV (1926), 159.

[23] Josephus, *Antiq.*, XIX, v, 2 (§ 281); *Bel. Jud.*, II, xviii, 7 (§ 487); *C. Apion.*, II, 4 (§ 35).

[24] *B.G.U.*, IV, 1151; see Fuchs, p. 93, Engers, pp. 155 ff., both of whom give references to further literature.

[25] *C. Apion.*, II, 4 (§ 37); *Antiq.*, XIV, x, 1 (§ 188).

the whole most satisfactory is the one recently suggested by Engers[26] that the Jewish πολίτευμα was originally a parallel one to the Greek πολίτευμα as represented by the recently discovered Alexandrian Code. Since Alexandria was made up of both πολιτεύματα, by this theory, citizens of either could properly call themselves Alexandrians.[27]

I have no new light to throw upon the problem of the status of the Jewish πολίτευμα in Alexandria. Whatever that may ultimately prove to have been, the fact will remain that Jews in Ptolemaic times had considerable autonomy and jurisdiction in the name of their own law, and that this jurisdiction, at least at first, was one of the rights preserved for them by the Romans, for to that fact we have the specific witness of Strabo.[28] According to Strabo Jews in Egypt had long been given sections in Alexandria where they lived with their own courts and law,[29] while they had also assigned to them, or lived in, other parts of Egypt, presumably rural from the way

[26] *Op. cit.*

[27] I accept this explanation in spite of the difficulty that the right of Jews to call themselves Alexandrians, far from being universally recognized, was challenged at least by Apion. See Josephus, *C. Apion.*, II, 4 (§ 38).

[28] The decree of Julius Caesar mentioned above may have included a guarantee of this Jewish jurisdiction, and been somewhat to the same purpose as the following letter, which settled a similar problem in Sardia: "Lucius Antonius, the son of Marcus, pro-quaestor and propraetor, to the rulers, council, and people of the Sardians, greeting. Jewish Roman citizens have come to me and showed that they had from the first an assembly of their own according to the laws of their forefathers, and also a place of their own where they settled their affairs and mutual disputes. They asked that they might continue to do so, and I judged that these privileges be preserved and permitted." Josephus, *Antiq.*, XIV, x, 17 (§ 235).

[29] It is usually said that the Jews were assigned two of the five divisions of the city since Strabo says, in the passage mentioned in the following note, that a section of the city was given to the Jews, while Philo says, *In Flacc.*, 55, that two of the five were called the Jewish sections because they were inhabited mostly by Jews. See Juster, *Les Juifs dans l'Empire Romaine*, II, 178, n. 1. But obviously Gentiles lived in these sec-

in which they are mentioned.[30] Over these ruled an ethnarch, governing the nation, dispensing justice, supervising Jewish contracts and laws as if he were the ruler of a free republic.[31] Juster rightly points out that this probably refers to a system of courts of which the ethnarch was the chief officer. With this passage should be paralleled Philo's description of the Jewish πολιτεία as he here calls it, in Alexandria, as involving two privileges for the Jews, the keeping of the ἔθεα πάτρια, and the μετουσία πολιτικῶν δικαίων,[32] which latter, in view of the other evidence, must certainly be interpreted as implying a measure of political independence, and with it some civil jurisdiction, since he says that it constituted a "life-line" (πεῖσμα εἰς ἀσφάλειαν) for the Jewish community. The destruction of the πολιτεία, with these two rights was a much greater disaster for the Jews than the destruction of the Jewish synagogues. The statement of Strabo, as supported by Philo, certainly implies a jurisdiction wider than the enforcement of the Jewish ceremonial law, and contract law is specified by Strabo as being a part of the ethnarch's province. Fuchs[33] understands this as meaning that the Jews had not only civil,

tions also, while Jews lived in large numbers all over the city. See Philo, *loc. cit.*, and *Legat.*, 132. The conclusion that these two quarters were the part "assigned" to the Jews seems not certain.

[30] Strabo, *ap.* Josephus, *Antiq.*, XIV, vii, 2 (§ 117); Philo, *In Flacc.*, 43; Juster, *loc. cit.*; Tarn, *Hellenistic Civilization*, p. 173. See below, pp. 159 ff.

[31] Strabo, *loc. cit.* See Juster, *op. cit.*, II, 111, n. 1. Under Ptolemaic law there was a system of officers directly responsible to the king, officers who were probably, though not certainly, Jews themselves. See the *Letter* of Ps. Arist., 182.

[32] *In Flacc.*, 53. R. W. Husband, *The Prosecution of Jesus*, p. 32, quoting from Yonge's inaccurate translation, interprets the passage, along with several others which he uncritically groups together, as referring to religious law and custom, and implying no legal power in civil or criminal matters.

[33] *Die Juden Ägyptens*, p. 91.

but criminal jurisdiction over their own members, and Juster admits that it implies the right of the Jews to execute their own sentences.[34]

In spite of the new papyri finds, we still unfortunately know only too little of how much jurisdiction the Romans in practice left not only to the Jews, but to any of the former courts of Egypt. For under Roman administration legal jurisdiction was closely united with rulership, and theoretically the Prefect was the only judge in Egypt. He conducted a circuit court, with yearly sessions at Alexandria, Pelusium, and Memphis, where judicial decision of the most important cases was combined with inspection of the governmental organization. But as the handling of all litigation for the whole of Egypt was of course too much for one man, many grants of power of judicial decision even in criminal matters were made to local officers, since in any case the legal practice followed the principle of personality of the law, and each of the main groups, Romans, Greeks, Egyptians, and Jews, was subject, at least in theory, to its own law.[35] It is obvious that as the Roman administrators were thus forced to learn the laws of the various members of their constituencies, and so were led into the construction of the *jus gentium*, at the same time the decisions of the native or local delegates, since they had judicial power only as delegates, would have had to conform quite closely to Roman principles or conceptions of justice, especially in any serious case. Thus while the decisions of Jewish courts at this time were subject to appeal to Roman decision, it is clear from Tannaitic tradition that Jews exercised considerable common-law jurisdiction among

[34] II, 114.

[35] Joseph Vogt, *Römische Politik in Ägypten*, 1924, p. 9. R. W. Husband, *The Prosecution of Jesus*, pp. 137-149, overstates the Roman reservation of legal procedure.

Jews, and the very fact that we know of one case of appeal makes it all the more clear that Jewish judges must have had to pay careful heed in such matters to the laws used by their superiors.[36] They must have been obliged, frequently, to disregard their Jewish law altogether, and pass judgment in a way pleasing to the Romans. So it is striking that the internal evidence of Philo's own remarks on the law will lead us to conclude that many criminal suits, apparently only where both parties were Jews, must have been settled before the Jewish tribunal, a matter which could have been more easily adjusted then than now, since all ancient law tended to treat crimes in which one person injured another in person or goods as matters in which the injured individual, rather than society at large, must take the initiative in action. Yet Philo clearly distinguishes crimes which were of a private or personal character from those which seemed a threat against society at large, and speaks of treating the latter in terms which are as clearly Roman as the treatment of the former is Jewish. Jewish law had no application for him to highway robbery, but seemed final in petty larceny, if the thief and the person robbed were both Jews.

In a word the law of the Jews as Philo describes it presupposes considerable Jewish autonomy in minor matters, while the Roman law had made the Torah a dead letter in matters of greater import. It is interesting to compare this situation with the judicial procedure revealed in the newly discovered edicts of Augustus to local strategoi in Cyrene and Crete.[37] One of the edicts, number IV, it is worth quoting here entire:

[36] Instances of both are quoted by Juster, *op. cit.*, II, 150, n. 2.

[37] The edicts have been published by several scholars. I have used the texts and commentary of Anton von Premerstein, "Die fünf neugefundenen Edikte des Augustus aus Kyrene" in *Zeitschrift der Savigny-Stift.*, XLVIII (1928), 419 ff. The edicts are of the year 6 B.C.

Imperator Caesar Augustus, chief priest, holding the tribunate for the seventeenth time, declares:—In case legal disputes shall arise among the Greeks in the province of Cyrene, in capital cases the one in charge of the province shall personally institute proceedings, or assign a panel of judges (*συνβούλιον κριτῶν*); but in all other matters it is right to appoint Greek judges unless the defendant, whether he is sued or accused, demands Roman citizens as judges. But when Greeks are appointed as judges according to this edict no one shall be appointed to judge a case who comes from the same city as either the plaintiff, whether suing or accusing, or the defendant, whether sued or accused.

By this the legal procedure in all but capital cases was left entirely in Greek hands as long as the defendant did not demand a Roman hearing. The strategos had only to see to it that the case came to trial. But from Edict I, as von Premerstein numbers them, we learn that even in murder cases one-half of the panel of judges appointed were to be Greeks if the accused so requested. It would seem likely that the procedure with Romans on the bench would have followed Roman lines, even though Greeks were sitting with them, since the Romans' prestige would have been totally predominant. But the trials for non-capital offenses and civil suits, where only Greeks presided, would just as clearly have followed Greek law, since otherwise there would have been little reason for the appointing of Greeks. There has long been evidence that Romans had sometimes made such arrangements in the provinces, the most striking instance of which is the relation between Roman and local courts in Sicily as described by Cicero,[38] but for the Empire there had been insufficient evidence for concluding that the recognition of local courts was made quite so explicit as this edict now reveals to have been the case. Even with this new evidence, von Premerstein is quite right in warning against

[38] *In Verrem*, II, ii, 13, 32.

too hasty generalization that the legal situation of these decrees applied to all the Empire. And yet the decrees fit in so strikingly with the legal picture Philo gives that I cannot help feeling that the relations between the Jews and Romans in Alexandria must have been fundamentally the same as those between the Greeks and Romans in Cyrene, so that the Jewish law could have been kept in matters of petty crime, or in civil matters, but must have been discarded in treating more serious breaches of the peace.

Indeed, Jewish courts in Alexandria had been conducted for many years before the Roman conquest under generally similar circumstances. As has been pointed out, there had been partial Jewish autonomy under the Ptolemies, but along with every other legal system of Egyptian territory the laws of the Jews were subject to the general supervision of the common king, and to the obvious social pressure to do nothing which would be considered antisocial by the other groups, particularly the Greeks. Especially must that social pressure to conformity have been felt in matters of criminal law and of property which touched the common life of the city. If the Jews were more strict with their followers than the Gentiles, that would have concerned the Greeks very little; but if they allowed men to go unpunished who were regarded by the rest of Alexandria as criminals it was a different matter. So in Alexandria under the Greeks as under the Romans one would expect modification of the Jewish law to have taken place rather in the direction of introducing new Greek penalties than in mitigating old Jewish ones, though there might well have developed a sense of dissatisfaction among Jews who after generations saw the old Torah demanding extreme penalties for what were really

minor offenses, and which were treated as such by their neighbors.

That is, if we understand Philo's general "method," we infer from the very form of his exposition here that he is driven to make Jewish law conform to the various elements of jurisprudence in Alexandria in his day by a practical necessity, and we find that the Jewish courts of his day must have been under precisely the same necessity. Since in the middle of his exposition he bewails the obligation which keeps him in public office, it seems to me not a remote step for us now to take to say that the law as he expounds it must have been the law as it was understood and applied in those practical courts.[39] The concern of the present study is thus to analyze the *De Specialibus Legibus* to see whether or not Philo's statements justify these characterizations of them. In brief, arguing from general probabilities, we should expect that the Jewish practice would have been basically, even, as far as possible, literally, true to the Word, and that especially those laws of diet and cultus which marked the Jews as socially distinct would be carefully preserved. It was particularly to preserve these laws that the Jews were offered their partial autonomy in Hellenistic Egypt, and of course the observance of such customs, affecting in no sense the life of the Greeks and Romans in Alexandria, would have been laughed at but tolerated by both. In these laws there would be little change, then. But in the laws which we now call common, which society has to have more or less uniform to exist, in these we should expect to find deeply significant changes, often, indeed, Jewish law entirely set aside for general Alexandrine jurisprudence. If it appears that such is the system of law which Philo describes, it seems to me that it will be no leap in the dark to conclude

[39] See below, pp. 214 ff.

that his law may be regarded as that used in Jewish courts in his day.

It must be understood that what Philo himself says about the law will appear often in the form of mirror-writing, especially where there has been any conflict between his Jewish literalism and the necessity of adaptation to some divergent statute. Here, as in the case of the ritual law, he will try to represent himself as only stating the real intent of Moses' legislation. But his mind is not working in the same direction in both cases. In expounding the ritual law he is really starting his thinking from the Jewish law itself. In the description of other law he is usually, or frequently, starting from the gentile precept which society forces upon the Jews, and then is adjusting his biblical texts to that necessity. But he will not admit that he is doing so, apparently, even to himself. He seems still sincerely to believe that he is only expressing Moses' true intention even when he is rejecting what the Torah plainly stipulates in favor of laws that are recognizably Greek or Roman. Thus his remarks will still take the form of scriptural commentary, in spite of the fact that that form exactly reverses his mental processes. The *De Specialibus Legibus*, while not full of such allegorical contortions as characterize many of Philo's other writings, still bears little superficial resemblance to a treatise on practical law.

It is because I am convinced that much more importance must be attached to the substance than the form of Philo's writing that I dare assign practical value to the laws described in this treatise in spite of the fact that three of the most careful scholars in the field have definitely denied them any such importance.

The first of these is Dr. Jean Juster, in his great work

Les Juifs dans l'Empire Romaine.[40] He admits that a part of the discussion of the Mosaic Law by Philo had a practical interest, but despairs of separating the practical from the theoretical. He writes:

> A nous il nous est impossible d'induire, comme le fait Ritter, l'intérêt pratique des interprétations philoniennes du simple fait que les Juifs d'Alexandrie avaient leur jurisdiction propre. Avant de vouloir retrouver dans Philon la jurisprudence du tribunal juif d'Alexandrie, il faudrait, d'abord, savoir si ce tribunal exerçait sa jurisdiction sur toutes les matières commentées par Philon—or, c'est ce que nous ignorons. Inférer l'intérêt pratique des interprétations de Philon du fait de l'existence d'un tribunal juif à Alexandrie et, après cela, vouloir retrouver la jurisprudence de ce tribunal dans Philon, c'est, nous semble-t-il, tourner dans un cercle vicieux.

Juster is quite right in refusing to conclude that the remarks of Philo had any practical importance from the simple fact that the Jews in Alexandria had jurisdiction of their own, though to do so seems a piece of unsupported assertion rather than a vicious circle, as he calls it, since we know of that jurisdiction from sources other than Philo. Yet it is interesting that Juster himself, though he thinks it impossible to separate allegory from practical laws, says,

> Cependant, à travers les œuvres de Philon, on peut glaner, très rarement, il est vrai, des renseignements de détail très intéressants pour notre sujet.

Careful a scholar as Juster is in general, it is clear that he has established no criterion for culling out the passages he distinguishes as practical, other than that when Philo makes a remark which seems to fit into a point Juster wants to make he uses it.[41] This is hardly better methodology than that which he rightly rejects. Particularly

[40] See especially I, 4 ff., and II, 156, n. 7.
[41] As for example, in II, 158, n. 2.

damning for the thesis that practical law is to be found in Philo's writing does he consider the fact that by any such thesis one would be forced to conclude that the Jews exercised a capital jurisdiction, a conclusion which in its complete form he rightly says it is impossible to adopt. That Jews ever had the formal and official right in Alexandria, especially under Roman rule, to execute sentence of death is most unlikely,[42] though Origen gives the most specific information that such a right was enjoyed by the ethnarch in Palestine.[43] But that by no means prevents the conclusion that the Jewish courts could sentence to death *subject to the approval of the Roman ruler*, just as was done in the case of Jesus, or that such approval, if the argument remotely appealed to the sense of the ruler, was not usually obtained at least as easily as in that case. And we have always to remember the use of lynch law by the Jews to which Juster himself has called attention,[44] as found in Acts in the case of Stephen, and of the frequent attempts on Paul's life, and in the lynching party described in John which proposed to handle the case of the woman taken in adultery.[45] Toward lynching the Roman authorities seem on the whole to have been quite indulgent when it was only a case of Jews killing in the name of their religion a fellow Jew who was not, like Paul, also a Roman citizen. So if the Romans winked at Jews' lynching of Jews, or shrugged their shoulders at demands for execution, it is by no means impossible that the Jews did have considerable latitude in enforcing among themselves their own standards of justice. To

[42] Juster, II, 150, n. 2.

[43] Origen, *Epist. ad Afric.*, 14; see Juster, II, 112, n. 4, and II, 151, n. 2.

[44] II, 158, n. 2. Much better instances of Philo's appeal to lynch law than the one quoted by Juster are the cases discussed below, pp. 33 f., 104 f.

[45] I do not regard the poor MS authority for this story as a part of the Gospel of John as invalidating its importance as a testimony of customs of the day. See below, p. 89, n. 43.

throw Philo's remarks on law out of court, then, simply because he frequently asks for the death penalty is a most summary procedure. Juster has, in fact, presented us with a false dilemma: Either, he says, we must conclude, merely from the fact that Jewish courts in Egypt had their own jurisdiction, that therefore Philo's law was the law actually used in those courts, which, we agree with him, is obviously an impossible sequence; or else we must with him deny that Philo's law is practicable because we do not know from other sources that the Jews had the formal right to execute every one of the sentences mentioned, an equally inconsequent bit of reasoning in view of the extended use Jews made of lynching, and the ease with which they could get Roman approval of their sentences. But the real criterion in the matter, the internal evidence itself of Philo's remarks on law, Juster does not take into account at all. So it is on the basis of that evidence that I disagree with Juster altogether, and think that in the *De Specialibus Legibus* Philo is thinking throughout of the law used in Jewish courts in Alexandria.

The second and most recent scholar to deny practical value to Philo's remarks on law is M. Émile Bréhier, who says of the *De Specialibus Legibus*, "On chercherait en vain dans cette œuvre une pensée de politique pratique."[46] He sees Philo's ultimate aim, as it in general was, to have been the production of a great moral code. So while he recognizes that there are anomalous features in Philo's exposition of the law, in that Philo shows several remarkable changes from Jewish to Greek legalism, he regards them only as anomalies, merely noting that Mangey pointed out several such interesting details, but

[46] *Les idées philosophiques et religieuses de Philon d'Alexandrie* (2d ed., 1925), pp. 30 f.

insisting that "les influences ne s'étendent pas au dela de quelques détails." Profound a Philonic scholar as M. Bréhier is everywhere known to be, on this point he seems to have made no attempt to analyze the material, and so is not aware of a fraction of the gentile legal influence there to be identified, or of its significance when viewed as a whole.[47]

Reluctant as I am to come to a different conclusion from that upon which these two scholars agree, I am still more hesitant to disagree with Dr. I. Heinemann of Breslau, whose learned translation, with notes, of the *De Specialibus Legibus*[48] I found to be the most helpful work done by anyone after the labors of Cohn and Wendland in establishing the text. In the following study I have used freely the material he collected, though with acknowledgment, I hope, in every case. Much of his quotation of parallels with later Jewish Halacha had no bearing upon the point under discussion here, but he recognized in many details that Philo's remarks were very close to Greek law, and in a few cases to Roman law. Yet the parallelisms he has noticed, while by no means all those that could have been pointed out, might, it seems to me, have led him to a different conclusion had he gone on himself to collect his own material instead of leaving it scattered on the road in notes to his translation. This he seems to have made no effort to do. The only reference to the possibility that practical law lay behind the remarks of Philo is confined to a single footnote:[49] "Für Z. Frankels Vermutung, dass gewisse halachische Angaben Philos auf der abweichenden Rechtsprechung des Gerichtshofes in

[47] It is strange that he refers only to Mangey, and has not recognized the contributions of Heinemann.

[48] *Die Werke Philos von Alexandria in deutscher Übersetzung*, 2. Teil, pp. 3-314 (Breslau, 1910).

[49] P. 6, n. 4.

Alexandria beruhen mögen, finden sich keine genügenden Anhaltspunkte."[50] The learned world must judge whether, with the material I have added, I am justified in feeling that he has mistaken the significance of the Greek and Roman legalism in Philo's writing.

The work of Bernhard Ritter to which Juster, and possibly Heinemann, refers is a most valuable monograph, *Philo und die Halacha, Eine vergleichende Studie unter steter Berücksichtigung des Josephus*, Leipzig, 1879, but developed almost exclusively, as the title suggests, by comparison of the legal interpretation of Philo with that of the later rabbis whose legal casuistry went into the Talmud. He occasionally refers to parallels in gentile law, but has made no attempt at a comparative study from that point of view. Consequently Juster is quite right in calling unproved Ritter's conclusion that when Philo differs from the later rabbis in the interpretation of the law he must in those passages reflect the practical decisions of the Jewish court at Alexandria. But if Ritter did not prove his point, that does not mean in itself that the point is unprovable.

In discussing the legislation of the *De Specialibus Legibus* I have been driven to follow in general Philo's order of discussion, rather than to rearrange his material under a more usual, and sensible, legal classification. For argument as to whether any law given by Philo may be considered as one that was actually used by the Jews will depend so often upon its context in Philo's general discussion that that argument, at least in a first study of the material, had to be presented in Philo's own order. A reclassification of his laws by some other method is a sec-

[50] I could find no passage in the writings of Frankel to which this might be a reference. Did Heinemann mistakenly write Frankel for Ritter?

ondary matter which I have relegated to a summary last chapter. His exposition of religious prescriptions I have passed over lightly as being unimportant in detail for our purpose, but as deserving a place in the total picture of Jewish law in his day.

II

THE DE SPECIALIBUS LEGIBUS

BOOKS I AND II

THE *De Specialibus Legibus* opens with a discussion of the law requiring circumcision which Philo cannot class under any of the Ten Commandments, but which represents too important an actual practice of the Jews for him not to treat it at once in his apologetic description of the Jewish law, since the custom was notoriously a matter of ridicule among the Greeks and Romans. Philo argues that the rite should call for no ridicule, since it was practiced also by the Egyptians, whom he here calls the most ancient, and populous, and philosophic of races, so far as I can recollect the only case in which he has a good word for a people who are generally with him a synonym for all that is bestial.[1] But Philo

[1] §§ 2 f. It is interesting that Philo in *Quaest. in Gen.*, III, 47 ff., and *Quaest. in Exod.*, II, 2, where much that is said in this passage is amplified, states that both male and female were circumcised by the Egyptians. These three passages of Philo are very important evidence for the practice of circumcision by Egyptians. Wendland discusses the passages, with many others from antiquity, in *Archiv für Papyrusforschung*, II (1903), 22 ff. He thinks that the evidence warrants assuming that circumcision was generally practiced among Egyptians in the Hellenistic age, if not earlier. Matthes, in *Zeitschrift für die alttestamentliche Wissenschaft*, XXIX (1909), 70-73, says that Egyptian mummies prove that the custom was observed in primitive Egyptian society as well. His conclusions are based upon the mummies at Naga-ad-der, and the mural representation of the rite at Sakkara, and yet I feel that the argument of Wiedemann (*Orientalische Litteraturzeitung*, VI (1903), 97 ff.) prevents the conclusion that it was generally practiced in ancient Egypt. For he points out conspicuous mummies, like that of Thutmose II, which have been found uncircumcised. Strabo (XVI, ii, 37; XVII, ii, 5; cf. Herodot., II, 104) says that the Jews circumcised both male and female, and that they had the whole institution from the Egyptians. Strabo is certainly wrong about Jewish circumcision of women, and modern opinion is divided as to whether the general Semitic custom of circumcision derived from the

is here defending an actual Jewish practice, and must do so in any way he can. So he goes on to point out the sanitary value of circumcision, and then the importance of the operation in that it makes the penis resemble the heart, a most proper resemblance since the one generates living beings, the other thoughts.[2] But most important of all its virtues in his opinion is the fact that he thought that circumcision promoted prolificness. These are the practical and immediate advantages of the rite. But it has also high symbolic value in being a gesture of contempt for merely human powers.

The passage is an excellent illustration of how Philo will resort to any frantic expedient to defend, when necessary, an actual practice of the Jews. He is not interested in the allegorical possibilities of the scriptural command, primarily, at all, but in finding by some hook or crook a rationalization of an actual custom of his people which will appeal to those who are criticizing it, or make those practicing it more comfortable in doing so. No better instance could be found to illustrate Philo's use of allegory in defense of an actual custom, in contrast with the use of allegory usually associated with Philo's name, where the motive is to obscure the original literal meaning and call attention to a teaching not to be otherwise found in the text. That is in the one case he is defending a group of sacred words into which he wants to put a new and ap-

Egyptians. See Orelli, "Beschneidung" in *Protest. Real-Encyc.*, II, 660 f., and especially Gunkel in *Archiv für Papyr.*, II (1903), 20.

[2] While it is quite in accord with the Old Testament to make the heart the seat of thought (see Hastings, *Dictionary of the Bible*, II, 317 f.), it is distinctly Stoic when Philo speaks of a *πνεῦμα* in the heart with generative powers, in this case power to generate thought. Aëtius, *Plac.*, IV, 5, 6 (Arnim, II, 838): *οἱ Στωϊκοὶ πάντες ἐν ὅλῃ τῇ καρδίᾳ ἢ τῷ περὶ τὴν καρδίαν πνεύματι* (*sc.*, *εἶναι τὸ ἡγεμονικόν*). Cf. Diog. Laert., VII, 159 (Arnim, II, 837): *ἡγεμονικὸν δὲ εἶναι τὸ κυριώτατον τῆς ψυχῆς, ἐν ᾧ αἱ φαντασίαι καὶ αἱ ὁρμαὶ γίνονται καὶ ὅθεν ὁ λόγος ἀναπέμπεται· ὅπερ εἶναι ἐν καρδίᾳ.*

pealing sense, but in the case before us he pays little attention to the form of the command, and is defending the practice itself. If we knew of Jewish circumcision from no other source than this passage of Philo we should conclude that it was a law actively enforced in Alexandrine Jewry, and from other sources in abundance we know that such an inference would be quite correct. One could almost set it up as a criterion that the more remote and anxious is Philo's defense of a Jewish practice the more likely that the practice being defended was current among Jews in his circle.

With this vigorous and illuminating preface, then, Philo passes to the real subject of his treatise, an examination of the individual statutes by which the legal principles laid down in the Decalogue are applied to specific problems.

The first two commandments of the Decalogue demand a rigorous monotheism, at least as Philo interprets them, and so, of course, lead him to a refutation of various types of false-god worship.[3] The stars, he thinks, may perhaps be regarded as gods, but are not rulers in their own right, for they are not self-caused or ultimate. In that sense there is but one true Ruler, from whom all other apparent gods are derivative. Wealth and the wealthy, fame, and the creations of the mythographers, all of which are objects of worship, are by no means to be substituted for worship of the one true God, whose existence Philo defends by an excellent argument from design of the cosmos. He regards the derivative deities as God's powers, identifies them with the eternal ἰδέαι,[4] and pro-

[3] §§ 13 ff., cf. *Decal.*, §§ 52 ff., especially § 81, where monotheism is the true way of Nature, that is a genuine Law of Nature.

[4] §§ 45 ff. For the identification of Stoic δυνάμεις with Platonic ἰδέαι, which was Philo's way of answering Aristotle's criticism of Platonism, see Cohn in *Philo's Werke*, I, 15 f., Drummond, *Philo Judaeus*, II, 73 ff.

poses to use them as preliminary means of approach to the true being of Deity. In the honoring of such a Deity, he assures his readers, proselytes are welcome, and are received at once into complete equality with native-born Jews.[5] On the contrary apostates to polytheism or idol worship are to be killed at once upon detection. Here is an interesting test case for Philo's calling for capital punishment. He could not have enforced the penalty legally, and prominent Jews in favor with the Romans would have been inviolate, as was Philo's own nephew Tiberius Alexander who was sent as Roman governor to Judaea, and who abandoned the religion of his fathers.[6] But I am not so sure that a Jew of less imposing position would be altogether safe from lynch law from what Philo says if he were caught with idols secreted in his house. Philo's words are:

> If any of the Nation fall away from honoring the One they ought to be punished with the most extreme penalties for having deserted the most fundamental organization of piety and holiness,[7] for choosing darkness before the most brilliant light, and for blinding the sharp seeing powers of their intellects. So then it is fittingly enjoined upon all who have a zeal for virtue that they should immediately and out of hand execute the penalties, taking the culprits to no court, to no council, indeed to no ruler of any kind. On the contrary they ought to give vent to their constant disposition to hate evil and love God by exercising it in bringing

An excellent case in point is *De Agricult.*, 166 ff., where *σπουδή*, *βελτίωσις*, and *τελείωσις* are thus impressed upon the soul.

[5] §§ 51-53, a very important and unusual instance of an actual invitation to Gentiles to come in and enjoy Jewish monotheism. Clearly this was the chief appeal of Judaism to outsiders.

[6] Josephus, *Antiq.*, XX, v, 2 (100). Jews who apostatized were not unfamiliar to Philo. *De Confus. Ling.*, 2; *Vit. Mos.*, I, 31; Bréhier, *op. cit.*, pp. 61-66.

[7] *Ὡς λιπόντες τὴν ἀναγκαιοτάτην τάξιν εὐσεβείας καὶ ὁσιότητος* may be a reference, as Heinemann makes it, to military desertion, but seems rather an inverted way of mentioning that the crime involved was *ἀσέβεια*; see below, pp. 244 ff.

unmerciful punishments upon these impious ones, regarding themselves for the time being as everything, as counsellors, judges, Roman magistrates (στρατηγούς), members of the legislative assembly (ἐκκλησιαστάς), accusers, witnesses, laws, and the public itself (δῆμον) so that unhindered and unafraid they may dauntlessly carry on the fight for holiness.[8]

It would be difficult to find the lynching spirit better compressed into a single paragraph in any literature, while the specific mention that the case is not to be referred to the Roman governor gives the whole a most realistic ring. To justify this as the Jewish law[9] Philo does not quote the Old Testament legislation for apostates, which, as Heinemann points out, provided a regular legal process,[10] but quotes only the case of Phineas as precedent. It seems to me that there can be little doubt that Jews who were not otherwise protected were given short shrift by their Jewish friends if they dared to apostatize. The very fact that Philo despairs of settling the matter by any legal process whatever makes the reality of the section irresistible.

It is precisely in this connection that the adventures of Paul must confirm our impressions of the reality of Philo's call to lynching apostates. Paul himself records that he five times received the thirty-nine penal stripes of the Jewish law,[11] that thrice he was beaten by rods, meaning that at the instigation of the Jews he was penalized by the Romans, while once he was taken out and stoned.[12] In the cases where appeal was made to the Romans, probably the Jews represented him as an instigator of riots,[13] but in the other two sorts of action, and particu-

[8] §§ 54, 55.
[9] On Jewish lynching, see above, p. 25.
[10] Deut. 13. 12 ff., 17. 2 ff. Heinemann, *Werke, ad loc.*
[11] Josephus, *Antiq.*, IV, viii, 21, 23 (§§ 238, 248).
[12] II Cor. 11. 23-25. [13] As in Acts 16. 20-22.

larly the last, he was simply taken in hand by the Jewish mob itself, and, if we may believe Acts, at Lystra he was left for dead.[14] Only by running away did he escape a similar treatment at Iconium.[15] In all these instances there was no charge ultimately against Paul but that he had taught a Judaism which the Jews did not like. It is plain from the rescue of Paul by the Roman guard at Jerusalem that the Romans did occasionally interfere in these lynching parties,[16] but equally plain that they often did not interfere, and in cases where the mob was successful the Romans took no punitive measures.

Jewish judicial action, if such there ever was, for apostasy and blasphemy, seems no less to have disregarded the Roman reservation of the *ius gladii*. Stephen, again if Acts is correct, was condemned and stoned after hearing before the Sanhedrin;[17] the Jewish rulers were conspicuous members of the mob at Iconium; while Paul is represented as saying to Agrippa and Festus to the face that when he was persecuting Christians he arrested them under warrant from the chief priests, and himself was one to vote, apparently at some Jewish court, that they be put to death,[18] with the implication that the sentence was executed. The trustworthiness of this latter detail is not high, though there was nothing about it which seemed inherently impossible or improbable to contemporary readers, but the evidence of the New Testament is ample that Jews acted precisely in the spirit of Philo, and, without reference to any Roman tribunal, freely followed their own instincts in dealing with heretics. Philo seems to be expressing here not rhetoric, but the actual Jewish procedure of the day.

[14] Acts 14. 19.
[15] Acts 14. 2-6.
[16] Acts 21. 27 ff., especially 31.
[17] Acts 6. 8—8. 1.
[18] Acts 26. 10.

The Jewish law requiring that apostates be lynched is a particularly fortunate law with which to begin, for it is one of the few we will encounter where there is definite external evidence substantiating Philo's statements. In III Maccabees, after it has been described how Ptolemy has relented to the Jews, it is stated:

> The Jews receiving this epistle did not at once make haste to prepare for their departure, but desired further of the king that those of the Jewish race who had of their own will transgressed against the holy God [and the law of God] should receive at their hand fitting punishment, urging that those who for their belly's sake had transgressed against the divine commands would never be well disposed to the king's commands either. And he acknowledged the truth of what they said, and praising them gave them full indemnity to destroy in every place in his dominions those who had transgressed against the law of God, *and this* with all freedom without any further authority or inquiry from the king. Then having received his words with applause, as was fitting, their priests and the whole multitude with shouts of hallelujah departed in joy. So as they went on their way they slew whomsoever they met of their countrymen who had been defiled, and put them to death with ignominy.[19]

III Maccabees is apparently a document from the second century B.C., written to be read in the synagogues in Egypt in connection with some festival,[20] and the festival seems to be unquestionably in memory of the granting of autonomy to the Jews.[21] But whatever the festival, the fact is clear that for two centuries before Philo the Jews had constantly been reminding each other that they had been granted the specific right to execute apostates without reference to any royal tribunal.[22] Philo has changed

[19] 7. 10-15; Emmet's translation.

[20] Tracy, in *Yale Classical Studies*, I, 247.

[21] See 7. 19-23, quoted by Tracy, *loc. cit.*

[22] It is striking that in ancient Egypt, as Diodorus Siculus tells us (I, 77), in case anyone killed a sacred animal the people lynched the culprit without awaiting trial. See Jean Dagallier, *Les institutions judiciaires de*

this law only to add στρατηγός, the Roman executive. I can see no room for doubt but that Philo has preserved the actual law used by Jews for apostates.

Philo concludes his general discussion of monotheism with a warning to Jews that divination of all kinds is highly dangerous for one who wants to keep his religion pure. So, he says, Moses banished all sorts of diviners from his commonwealth, and forbade all recourse to them.[23] It is notable that he makes no attempt to lay down a formal law for such matters, but leaves it entirely advisory. Divination like all other forms of magic, was in general favor with the Jews,[24] though officially frowned upon. But Philo's remarks would have sounded extremely sensible to a gentile jurist of that time, and what Philo has done is very interesting. Biblical law was strict against magicians of every kind,[25] and there are two passages describing their treatment. The first is a general law[26] which demands that such people be stoned. Such a law was obviously impossible in Alexandria, so Philo ignores it completely and bases all his remarks upon the other passage[27] which describes the diviners of the Canaanites, and says that Yahweh will have nothing to do with them and so "drives them out" from before the Israelites. By stressing this incident, which did not pretend to be more than an historical statement of what happened to

l'Égypte ancienne, 1914, p. 177; cf. Tertullian, *Apology*, 24. Jews were of course not unique in disregarding the Roman *ius gladii* to punish sacrilege. Plutarch records as a practice of his own time that the Arcadians stoned anyone who voluntarily invaded the sacred precincts of Zeus Lykaios: *Aetia Graeca*, 39. For other ancient references to the custom see A. B. Cook, *Zeus*, I, 67, n. 2. This was as much a matter of religious lynching as the law of Philo.

[23] § 60.

[24] See Schürer, *Gesch. des jüdischen Volkes*, III (1909), 407-420; and below, pp. 186 ff.

[25] Lev. 19. 26, 31.

[26] Lev. 20. 27.

[27] Deut. 18. 9-14.

those particular augurs, Philo has formulated a Jewish law which would accord with Roman principles. The Roman attitude toward sorcery was, at least officially, consistent. For while all classes of society persisted in consulting sorcerers, they were officially always regarded as undesirables. Dio Cassius records that in 33 B.C. Agrippa drove all astrologers and seers from Rome.[28] Again under Tiberius in 11 A.D. it was forbidden to have recourse to magicians, whether privately or in the presence of witnesses,[29] while, in his summary of the acts of Tiberius, Suetonius[30] tells first of the activities against Egyptians and Jews, and then of his exiling all sorcerers from Italy. The juxtaposition is probably not fortuitous, and Philo knew of the latter as well as of the former.[31] But the action of banishment must not be regarded as unwarranted, for it was clearly the regularly recognized treatment for such people, inasmuch as the same action was taken by Vitellius and Vespasian,[32] and was recorded by third-century jurists as the stated penalty for magicians from the upper classes.[33] Attention is called to the parallel between Philo and the expulsion of A.D. 16 by Bréhier,[34] who suggests that this incident influenced Philo's statement of the Jewish law. Heinemann[35] rejects the suggestion because he is convinced that Philo is working wholly from Scripture. But it seems to me that the passages selected by Philo's tradition have been selected with Roman law defi-

[28] XLIX, 43.
[29] *Ibid.*, LVI, 25; Suetonius, *Tiberius*, 63.
[30] *Tiberius*, 36.
[31] Dio Cassius gives a fuller account in LVII, 15; cf. Tacitus, *Annal.*, II, 32. The action was taken *senatus consulta.*
[32] Dio Cassius, LXV, 1, 4; LXVI, 9, 2; Suetonius, *Vitellius*, 14; Tacitus, *Annal.*, xii, 52; *Hist.*, ii, 62.
[33] Paulus, *Sent.*, V, xxiii, 1; *Digest.*, XLVIII, viii, 1, 1; 3, 5; 16. See Kleinfeller in Pauly-Wissowa, *Real-Encyc.*, XIV, 396 ff.
[34] *Les idées . . . de Philon*, p. 180.
[35] *Werke*, p. 28, n. 1.

nitely in mind, for his conclusion that sorcery should be punished by banishment is as clearly in accord with Roman principles and usages as it is in contradiction to the explicit commands of the Bible.

So much for monotheism as such. But from monotheism as a legal principle a great body of statutes was derived by the inspired Moses, namely, all those laws which he laid down prescribing the correct forms of worshiping God, and which are only the obverse of the prohibition of the wrong forms of worship. So Philo goes into detail about the laws which define the plan of the temple, the priesthood, and the proper character, rewards, and duties of the priests, the proper animals and birds for sacrifice, times and seasons for offering, with general warnings as a conclusion. He justifies each ritualistic provision on the basis of Greek customs or conceptions, and seems to see their only value in their symbolizing non-Jewish mystical conceptions. The objective rite, in its old Jewish sense, seems to have meant nothing to him at all. But this does not mean that he did not regard the sacrifices with great reverence. The fact that Zwinglians and Calvinists made the external rite of the Eucharist a thing of no value in itself, and put a meaning upon it utterly foreign to the entire ecclesiastical tradition for the rite, by no means prevented Calvinists and Zwinglians for centuries from taking the sacrament with the deepest emotion and reverence. So Philo, justifying the Hebrew ritual from a Hellenistic point of view, and probably himself sincerely so regarding it, was yet undoubtedly one of the most devout pilgrims to be found at the feasts in Jerusalem.

For what Philo actually did was to turn the whole ritual and priesthood, customs, garb, rites, and seasons, into a highly developed mystery religion, in which the High Priest was an incarnation of the Logos in symbol

(perhaps Philo even considered him so in fact), who was the mediator to God, not only for the Jewish people, but for the whole human race, and indeed for the entire cosmos. There is room here for only one example, the passage where Philo describes the effect of the temple cultus upon the proper worshiper:

> The feast is a time of festivity (εὐφροσύνη), and the festivity which is true and free from artifice is intelligence (φρόνησις) set fixedly in the soul, while steadfast intelligence, in turn, cannot be obtained without purification from sins and abscision of the passions. For it would be absurd to demand that each of the animals for burnt offering should be sacrificed only if they have been found flawless and without blemish, while the mind of the sacrificer is not required to be purified in any way, or cleansed with the lustrations and sprinklings which the Right Reason of Nature (ὁ τῆς φύσεως ὀρθὸς λόγος, that is, natural law) pours into God-beloved souls through healthy and uncorrupted ears. . . . He (Moses) commands that one should celebrate, not after the manner of other peoples, but that in the very period of the festivity one should first of all purify himself by banishing his impulses to pleasure, then come to the temple to partake in hymns, prayers, and sacrifices, in order that by the place, as well as by what is seen and said, he may be worked upon through his chief senses, sight and hearing, and so come to love self-restraint and piety. Then in the sin-offering Moses gives the most drastic warning not to sin; for no one seeking amnesty for his sins is so perverse as to commit new transgressions at the same time when he is seeking release from his old ones.[36]

The sacrifices clearly have their value for him in bringing the ὀρθὸς λόγος τῆς φύσεως into the believer's soul.

But the Jewish cultus seems to Philo to be vastly superior to other mystery religions in this, that the others keep their saving knowledge secret from all but a very few initiates, and these not always morally *élite* persons, while any upright man may become a Jew and share in the Jewish worship.[37] A study of Philo's details from this

[36] §§ 191, 193.

[37] §§ 319 ff.

point of view would be most illuminating for the religious temper of the age, as well as for that of Jews in the Diaspora, but it has, unfortunately, no place in the present investigation. In the whole section there is little suggestion of Philo the Alexandrine Jewish lawyer, as there was little opportunity for that aspect of Philo to appear.

In one passage he defends the Jewish custom of using certain cities as sanctuaries for refuge rather than the altar, as would have been expected by Alexandrian Greeks,[38] ignoring, or not knowing, the implied existence of such an older custom among the Jews themselves.[39] Philo nowhere betrays the existence of any Jewish formal sanctuary in Egypt.[40]

The second book of the *De Specialibus Legibus* discusses the third, fourth, and fifth commandments of the Decalogue.

In his treatment of oaths Philo betrays as usual a typical mixture of Greek and Jewish notions. An oath he defines several times as an appeal to God as witness in a doubtful matter,[41] which Heinemann thinks is probably a Stoic definition.[42] The sanction of the oath is the wrath of God in case of perjury, and, once made, the oath, whether a vow or assertion, is beyond the control of the maker, and becomes an automatically operating principle of nature. So all natural law is an oath, and, we would infer, all oaths come to be natural laws binding upon at

[38] §§ 158 ff.; the same distinction is made in *Spec. Legg.*, III, 130. See Friedrich von Woess, *Das Asylwesen Aegyptens in der Ptolemäerzeit*, Munich, 1923.

[39] Exod. 21. 14, where reference is to the old local altars.

[40] His great discussion of the Cities of Refuge in *De Fuga et Invent.*, 91 ff., allegorizes the institution into a representation of mystical aspiration. See my "The Pseudo-Justinian Oratio ad Graecos" in *Harvard Theological Rev.*, XVIII (1925), 191 ff. See further below, pp. 53 ff., 118 ff.

[41] *Spec. Legg.*, II, 10; cf. Heinemann, *ad loc.*

[42] See his excellent essay, "Philo's Lehre vom Eid," in *Judaica; Festschrift zu Hermann Cohen* (Berlin, 1912), p. 110.

least the persons who have made them.[43] On this Stoic basis he concludes that when an oath or vow comes into conflict with the natural laws of right and wrong it is automatically invalid. So if a man in a rage were to vow to kill another man, or in passion were to swear to commit adultery with some woman, his vow, as breaking natural law, was a piece of impiety which he was under no obligation to fulfil (*ibid.*). Immoral oaths are thus not binding; rash oaths are, if possible, to be fulfilled, but by all means to be avoided; while pious oaths are to be observed at whatever cost (§§ 6 ff.). It is interesting to compare this treatment of oaths with a passage in that little remnant of strict Palestinian legalism, the "Fragment of a Zadokite Work" (xx, 5, 6): "No binding oath, which a man imposes upon himself with a view to perform a commandment of the law, shall he cancel even at the risk of death. Nothing which a man [imposes] upon himself with a view to [frustrate the la]w shall he make good even at the risk of death." (Charles's translation.) Much as this statement resembles Philo's, a comparison of the two reveals the essential fact that the loyalty of the Zadokite writer is supremely devoted to the letter of the Torah, while Philo's ultimate test of conduct is the natural law of his Greek idealistic neighbors.

[43] § 13: *νόμοι δὲ καὶ θέσμοι τί ἕτερον ἢ φύσεως ἱεροὶ λόγοι τὸ βέβαιον καὶ τὸ πάγιον ἐξ αὐτῶν ἔχοντες, ὡς ὅρκων ἀδιαφορεῖν.* The source of this conception of Philo cannot be identified. Hirzel, *Der Eid*, p. 74, n. 1, parallels this passage with a similar one from Hierocles four centuries or more later. See Mullach, *Fragm. Phil. Gr.*, I, 421 ff. But Heinemann, *Werke, ad loc.*, oddly argues that since the idea first appears so late in a philosophical text preserved to us, "Philo kann also hier kaum aus griechischer Quelle schöpfen." But he is at just as great a loss to connect it with the Jewish sources, since, while the idea appears in later talmudic tradition, it is not to be found in the Mishna. Heinemann's reasoning in this case seems to me to be quite wooden. Philo's remark is so completely Stoic in nature that one must assume that it originated in some Greek *milieu*, especially as Hierocles is notoriously only a tabulator of earlier material.

Indeed, in discussing the oath Philo is throughout thinking in Greek terms. Heinemann has clearly demonstrated that what Philo says of the form an oath should take is quite Stoic, or at least Greek, in inspiration. So Philo urges that assertive oaths, when they cannot be easily avoided, should fearlessly be taken, though not, if possible, in the name of God. His avoidance of the name of God is, of course, Jewish, but his solution of the problem is more Greek than Hebraic. For with the Greeks an oath was valid when taken not only by a deity, but by anything resembling divine nature.[44] So Philo recommends that, like the patriarchs, one swear by one's parents, not because he has biblical precedent for such an oath, but because the creative activity of the parents makes them like deities (§ 2). Also he recommends oaths by the lesser divine powers of nature, earth, sun, stars, heaven, or the entire cosmos, all of which he regarded as being lesser divinities (§ 5). It is highly probable that oaths in this form were very common among Jews in Philo's day, for the custom, which had no scriptural warrant, is not only warmly commended by Philo, but specifically mentioned, although to be rejected, in the Sermon on the Mount,[45] and it is no less probable that the custom came into Judaism from Greek, if not from definitely Neo-Pythagorean sources.[46] But when Philo goes on to praise the practice of swearing "By the ——," a form of oath in which the name of the deity adjured was omitted,[47] the closeness of his remarks to the Greek is made abundantly clear. For this form of evasion of oath is mentioned by the Scholiast to Aristophanes *Frogs*, 1374, and by Suidas, *s.v.* μὰ τόν: "He swears elliptically. And it

[44] Hirzel, *Der Eid*, 15 ff. [45] Matt. 5. 34.

[46] See Heinemann, *ad loc.*; Diels, *Elementum*, p. 48; Hirzel, *Der Eid*, p. 16.

[47] § 4.

was the custom in this way among the ancients sometimes to avoid swearing by God; but they were in the custom, by way of euphemy, to use such oaths as to say 'By the ——,' but not to add the name."[48] The Jewish conception and use of the oath would seem then, except for the avoidance of oaths by the Greek gods, to have been quite the same as that of their neighbors.

In some cases the Jewish use of the oath seems to have been peculiar. For example, Philo mentions and defends the Old Testament law that virgins in their fathers' houses, or married women, should not have the right to swear without the approval, respectively, of the father or husband.[49] Widows on the contrary must be very careful how they swear, for their oaths are valid.[50] Philo not only defends this law as a lawyer, but also stops a moment to show the allegorical value of the provision.[51] We should, then, if our method holds good here, expect that this was an actual practice of the Jews which would not agree with current Greek standards. Certainly, the latter is true, for throughout Greek literature there is no distinction between the oaths taken by men and women, except that in classic Greece women usually swore by goddesses rather than by gods.[52] Philo is thus not beating the air, but is faced with a sharp discrepancy between Jewish law and Greek practice, and his anxiety to justify the Jewish law, instead of ignoring it, makes it seem highly probable that Jews actually observed it.

[48] Quoted by Heinemann, *Philo's Lehre vom Eid*, p. 112. See also references in Hirzel, *Der Eid*, p. 81, n. 4; p. 96, n. 2; Plato, *Georgias*, 466*e*.

[49] § 24. [50] § 25.

[51] §§ 29 ff.

[52] An amusing instance of this is pointed out by Ziebarth (in Pauly-Wissowa, *Real-Encyc.*, V, 2076) in the *Thesmophoriazusae* of Aristophanes, where Mnesilochos, masquerading as a woman, has difficulty to remember to swear by goddesses and not gods.

But that Philo's discussion of the oath has the current usages of the Jews in mind, rather than primarily the scriptural text, is further made clear by what he says about ritualistic oaths. (§§ 32 ff.) Sometimes in a burst of emotion a man would vow his own person to the temple, and must then redeem himself with money. Philo quotes the fixed rate of redemption set forth in the Torah[53] but alters the schedule of values to fit the Greek currency of his day. So the Hebrew text sets fifty shekels for an adult man under sixty years of age, thirty shekels for a woman, etc. This is translated by the Septuagint literally as fifty and thirty drachmas, respectively, but Philo quotes it as demanding two hundred, and one hundred twenty drachmas, respectively. That is, his figures are just four times the scale of drachmas in the Septuagint. In attempting to explain this change Heinemann confuses the passage altogether by saying that the Septuagint translators had Alexandrian drachmas in mind, but that Philo had Attic drachmas.[54] He says that the Alexandrian drachma was worth double the Attic drachma,[55] and that the Attic drachma was worth four times the shekel.[56] Were Heinemann correct in his values the Septuagint should have doubled the shekel charges if it was transvaluating into Alexandrian drachmas. This

[53] Lev. 27. 3. Among the Romans such vowing of the person was regarded as an Iberian custom. See the account of Pacuvius in Dio Cas., LIII, 20.

[54] *Ad loc.*, p. 117, n. 1.

[55] In this he is quite wrong. The drachma of Alexander, commonly called the Alexandrian drachma, had precisely the same value as the Attic (see Tarn, *Hellenistic Civilization*, 201; Hultsch, in Pauly-Wissowa, *Real-Encyc.*, V, 1618), though Ptolemy I changed to the Phoenician-Rhodian standard which was slightly lighter, one Attic-Alexandrian drachma equaling 4.366 gr., one Phoenician-Ptolemy drachma 3.64 gr., so that 6 Ptolemy drachmas equaled 5 Alexandrian-Attic drachmas. See Hultsch, *ibid.*, 1615, 1621; and Angelo Segré, *Metrologia e circolazione monetaria degli antichi*, Bologna, 1928, pp. 265 ff.

[56] Josephus, *Antiq.*, III, viii, 2 (194).

was not done, but obviously "drachmas" was only written instead of shekels, and no attempt was made at transvaluating at all. But apparently because Philo has a living Jewish practice in mind he is not content to quote the law as it appears meaninglessly in the Septuagint, but transvaluates it accurately in terms of Attic values, as the law was probably understood throughout the Diaspora. Similarly he has transvaluated the scale for children, infants, and old people.

The laws about vowing property Philo expands following closely the laws of Leviticus 27, and nothing significant for our purpose appears.[57] It need only be noted in passing that Philo departs from later rabbinical tradition in that he interprets this scriptural passage of the animals vowed to the temple as referring to animals vowed for sacrifice, while the later rabbis understood it as referring to animals which after they had been vowed were sold, and the proceeds given for the support of the temple. Heinemann[58] points out this discrepancy, and oddly calls Philo's interpretation false. It would rather seem to me that the rabbis, after the collapse of the temple cultus, were giving a new interpretation to these laws which in themselves might be taken either way, but which, Philo is good evidence for believing, were actually taken as applying to animals vowed for sacrifice in his own time.

The subject of perjury is treated at considerable length by Philo under the commandment against false witness, but here he briefly discusses the penalty.[59] Since perjury is an offense against God, he says, God properly can and does mercilessly punish it. In the courts, however, Philo claims personally to approve of the death penalty, but says that the milder judges sentenced only to scourging.

[57] §§ 35-38. [58] *Ad loc.*, n. 4.
[59] §§ 27, 28. See below, pp. 174 ff.

Jews could have secured no support from either Greek or Roman opinion for a death sentence for perjury, since the crime was not actionable under the law of either of them,[60] so that it is probable that Jewish courts, however the judge on religious grounds might have deplored the necessity, had to be content with the penalty of scourging. Again, it is notable that Philo's sense of reality has forced him to state the actual penalty alongside his own ideal.[61]

In this connection it should be noted that the Diaspora produced in connection with the crime of blasphemy a law which contradicted the strongest instincts of traditional Jewish piety, but which was apparently strictly enforced. In one passage[62] Philo, after discussing the fitness of the death penalty for the sin of cursing or naming God,[63] says:

> But it seems that in this case "God" does not refer to the First God, Begetter of all things, but to the gods in the cities. But they are falsely so named as they are made by crafts of painters and sculptors. For the whole world is full of statues and images and such models, of whom it is necessary that we refrain from speaking ill, that none of the followers of Moses be accustomed to treat the appellation "God" with the slightest disrespect. For this title is most worthy of preëminence and of love.

At first glance it would seem that in this passage Philo is asking for the death penalty for blaspheming gods of the Gentiles, but it appears that he has no such penalty

[60] See below, p. 179.

[61] In *Spec. Legg.*, II, 252 ff. Philo also calls for the death penalty for perjury. But the passage as a whole is a judicial *tour-de-force*, by which Philo tries to demonstrate that the death penalty followed the fraction of all the commandments of the first table. Since the death penalty for some of them, as Sabbath breaking, could obviously not have been enforced, even by lynch law, and as we must be cautious in accepting Philo as expecting to enforce the death penalty, it seems that there is no ground for thinking that the Jewish courts in Alexandria seriously considered the death penalty for perjury. But see below, p. 181.

[62] *Vit. Mos.*, II, 205. [63] Lev. 24. 15.

in mind. For he sharply distinguishes between the treatment of those abusing the Name and these he is here discussing who speak against the gods of the heathen. He returns to the Jewish crime, as we might call it, and points out that that is an offense vastly more serious than is merely the speaking against the heathen gods. The latter, then, seems to have been a law corollary to the original Jewish provision, though how it was punished does not appear. The same advice against speaking ill of heathen gods appears in another passage, but only as an advice, and still with no penalty attached.[64] It is interesting that the same law reappears in Josephus: "Let no man blaspheme the recognized gods of other states, nor plunder strange temples, nor take a treasure dedicated to any god."[65] And again, "Our law-maker has expressly forbidden us to rail or jeer at the gods recognized by others on account of the very title 'god.' "[66] The marked similarity of these passages suggested to Weyl[67] that Josephus had taken them from Philo direct, but I am much inclined to doubt this dependence, and to see rather in both a reflection of an important law of the Diaspora. For the safety of the Jewish community in Hellenistic cities must have made it imperative that they keep their traditional scorn for idol worship well within bounds, and nothing is more natural than that they should have tried to justify this necessity by deriving the new command from some passage in the Bible. As to the death penalty for "naming the Name," the Jewish feeling against this sin was so deep that lynch law is more likely to have been called out in its defense than for almost any other law of the Jews.[68]

[64] *Spec. Legg.*, I, 53. [65] *Antiq.*, IV, viii, 10 (207).
[66] *Contr. Ap.*, II, 33 (237).
[67] Heinrich Weyl, *Die jüdische Strafgesetze bei Flavius Josephus in ihrem Verhältniss zu Schrift und Halacha.* Diss. (Berlin, 1900), pp. 33 ff.
[68] Badt, in his note to the *Vit. Mos.*, II, 205, points out that the later

From the section on taking the name of God in vain, then, one can learn of the great extent of Greek influence upon Jewish habits and forms of swearing. Oaths were frequently in the Greek manner, if not taken by Greek conceptions of divine powers, while all blasphemy against Greek gods was strictly forbidden. Yet women were still regarded in the Jewish, not the Greek, sense as unable to make a vow without the consent of their father or husband, if they had one, while the laws of ceremonial vows of persons or property to the temple were in active use in Alexandria to a degree which illuminates the closeness by which Alexandrian Jews felt themselves bound to the Jerusalem cultus.

The next section treats of the commandment to keep holy the seventh day, which Philo treats as the legal principle behind all the laws for the Jewish cycle of festivals.

He finds the Jewish festivals to be ten in number, to reach which "perfect" number he has had to include as festivals the Sabbath itself, the Fast, and a feast of his own invention, the Festival of Every Day. This last he treats first in a purely philosophic way which is of great importance for his ideas of salvation, but not of significance here.[69]

The Sabbath is defended and explained. It is the day on which the Jews assemble in every city for philosophical instruction and contemplation in the twofold directions of piety and holiness toward God, and of humanity and justice toward men.[70] Of the individual laws for keeping the Sabbath Philo gives unfortunately very few,[71] only the prohibition against kindling a fire on the Sabbath,

rabbis also deplored frivolous use of the word "God," but called for the death penalty for naming the Name.

[69] §§ 42-55.

[70] §§ 62-64; cf. *De Decal.*, 98.

[71] §§ 65-70.

and the fact that slaves and even domestic animals are also on that day to be relieved of all labor. The Greek readers whom he is trying to impress with the reasonableness of his Jewish legal system would have been little inclined to sympathize with Jewish casuistry of the Sabbath, so Philo is content with a general defense of the institution. It is a pity that a better picture of the Jewish Sabbath in the Diaspora has not been preserved.

But the number seven suggests the sabbatical clearance of loans, and brings up the question of loans and usury in general.

On the matter of charging interest on loans Philo shows acquaintance with several traditions.[72] First, he follows literally the command of the Scriptures that interest is not to be exacted from fellow Jews, while he thinks that strangers should be treated by different standards altogether. To deal with them as kindred, he says, is certainly an excess of virtue, since the true commonwealth (here Philo becomes Stoic) consists altogether of virtues and laws which lead to the Beautiful alone as the Good. Philo had in general by no means so narrowly racial a point of view as this passage would suggest. But he was faced by the facts of business life, just as Jewish rabbis were later, when they made the same adjustment in spite of talmudic idealism.[73] Philo is thus reflecting current Jewish practice and its usual justification, though he softens its harshness with Stoic idealism.[74] But in his conception of the whole system of borrowing and lending on interest he is closely akin to Plato and Aristotle in regarding it as an economic fallacy, leading the individual and society alike not to

[72] §§ 71 ff., 122.

[73] M. Lazarus, *Die Ethik des Judenthums*, 1898, p. 392. From Heinemann, *Werke*, p. 129, n. 2.

[74] On the conception of the πολίτεια here see Heinemann, *ad loc.*

prosperity but to penury.[75] But Philo argues that a man does not seek profit from lending money unless he is in need of increasing the funds he already has. Such a lender accordingly must expect so great a return in interest that the borrower is unable to pay either the interest or the principal, and in the end the lender is worse off than when he began. Such was, of course, frequently the result of ancient usury, and its risks were so great that an extremely wealthy man like Philo may well have refused to practice it.

Further, the number seven suggests the laws requiring the liberation of Hebrew slaves in the seventh year, and so introduces the subject of slavery in general. In two passages Philo repudiates the entire institution of slavery from a theoretical point of view. One of the passages states the theory of the Therapeutae,[76] but in the other Philo says as his own opinion that no human being is naturally a slave, for only the unreasoning animals are created with the design of ministering to the needs of men.[77] But in general Philo disregards this theory, and speaks as though he considered captives by the law of war

[75] Plato, *Respub.*, 556*b*. (Barker, *Greek Political Theory*, 1918, p. 322, in discussing Plato's remarks about interest, misunderstands, in my opinion, the meaning of *Laws*, 742*c*). Arist., *Polit.*, 1258*b*, 2-8.

[76] *De Vit. Cont.*, 70: "The Therapeutae are not served by slaves, since they regard the possession of servants to be altogether contrary to Nature. For Nature begat all men free, but the injustice and greed of certain men who aspire after inequality, the chief of evils, have harnessed the weaker men and committed the power over them to the stronger." Like much of the doctrine of the Therapeutae this seems to have a Pythagorean foundation. It may be that the repudiation of slavery which Aristotle recognizes as the tenet of many (*Polit.*, 1253 *b* 21, 1255 *a* 7; cf. Zeller, *Philosophie der Griechen*, I, ii (1920), 1400, n. 2) was orginally a Pythagorean suggestion, worked out, as here, on the basis of *ἰσότης*, the fundamental cosmic and social principle of that school. The influence of this conception was early felt through its Stoic version by Roman jurists; see A. J. Carlyle, *History of Medieval Political Theory*, I, 7 ff., 20-23, *et passim*.

[77] *Spec. Legg.*, II, 69.

and people born in household slavery[78] as of an entirely different nature from free-born people. This is chiefly brought out in connection with the Jewish institution of the sabbatical emancipation of enslaved Israelites. For he insists that those unfortunate Jews who, usually as a result of poverty, have had to pledge their persons in bonded servitude are to be regarded not as though they were φύσει δοῦλοι, but as hired servants and free men.[79] This is in immediate contrast with slaves who are not Jews, but who are truly slaves.[80] Philo did not mean to imply that all Jews are naturally free, all Gentiles slaves, but he does suggest a contrast between those who find themselves by force of circumstances in a servile position, and those who are really, and, he says, naturally, slaves. Yet no slave is of so low a condition as to lose his claim to being a human being, so that by divine law of Nature natural slaves have certain rights, especially to their lives.[81] But Philo is no antislavery agitator. He finds the institution on the whole a social necessity, "for there are myriads of life's affairs," he says, "which demand the ministration of slaves."[82] Of course, Philo is insistent upon the necessity of being humane toward slaves. But while he urges mildness and humanity in their treatment as a means of equalizing the difference between slave and free,[83] as a slave owner he points out also that kindness

[78] *Vit. Mos.*, I, 36. Pharaoh is criticized for enslaving the Jews when they were not properly slaves either from being prisoners of war, or from having been born slaves. Yet (*Spec. Legg.*, IV, 223) Philo forbids Jews to enslave their captives.

[79] § 122. Cf. *De Virtut.*, 123, where such Jews are οἱ μὴ γένει δοῦλοι. In *De Josepho*, 248, Philo deprecates the enslaving of Joseph, for he was τῷ ὄντι εὐπατρίδης, οὐ φύσει δοῦλος.

[80] § 123. This distinction between Jewish and gentile slaves was made by all Jews at the time. G. F. Moore, *Judaism*, 1927, II, 135-138.

[81] *Spec. Legg.*, III, 137. For Philo's remarks upon the killing of slaves see below, pp. 121 f.

[82] *Spec. Legg.*, II, 123.

[83] *De Decal.*, 167.

prolongs the life and profitable servitude of the slave.[84] Yet he regards corporal punishment of slaves as quite a part of the institution, for he points out that bad slaves impose upon the gentleness of good masters, and need to be given the medicine of punishment,[85] and at such times their slavish nature will appear in their abject and submissive yielding to the rod.[86]

Another law in connection with slavery as an institution of Hellenistic Judaism is most interesting. The Scripture forbade the restoration to his master of a slave who had escaped and wanted to dwell in the house of another man. The slave was to be allowed to live there as long as he wanted in perfect security.[87] The law is in itself an anomaly, for taken literally it would allow slaves to wander at will from one master to another, that is, it would make the whole institution of slavery an impossibility. The suggestion has been made that the law may have originally designated Jewish slaves who were fleeing to Jews for protection from their foreign masters who had taken them captive.[88] Whatever had been the original intention of the law, Philo found it in his Bible in its present utterly impracticable form, and used it in a most interesting way. He says:

> If a third generation slave of another man, says Moses, because of the threats of his master, or because of his consciousness of some offenses (which he has committed), or in case he has done nothing wrong but is only subject to a savage and harsh master, shall in terror flee to thee to get thy help, do not reject him. For to deliver up a suppliant is not pious, and even a slave is a suppliant when he flees to thy hearth as to a temple, where he ought rightly to have asylum until he either be brought into open and complete reconciliation (with his master), or until, failing that,

[84] *Spec. Legg.*, II, 90, 91.
[85] *De Somniis*, II, 294 f.
[86] *Leg. All.*, III, 201.
[87] Deut. 23. 16.
[88] See Bertholet in Marti's *Kurzer Hand-Commentar zum alten Testament, ad loc.*

as a last resort he be sold. For the consequences of any change of masters are of course uncertain, but an uncertain evil is better than a certain one.[89]

It is first to be noticed that Philo's version has made the scriptural law into a perfectly workable prescription. A fugitive slave is either to be reconciled to returning to his master, or is to be sold to someone else, the proceeds of the sale certainly going to the original owner. In any case he is to be held by the person with whom he has taken refuge until the matter is adjusted. This detaining of another man's slave is then justified on the grounds that the hearth is a sacred altar comparable to those in the temples, while the escaped slave is a suppliant at an asylum. But Philo's version is not only workable; it is taken over bodily from Greek law, according to which a slave treated intolerably might flee as a ἱκέτης to a holy place, where he might demand the right to be sold to another master.[90] It has been pointed out by Woess[91] that this custom was carried over into Ptolemaic Egypt, whence it even impressed itself upon Ulpian's legislation, so that it is not surprising to find that Philo's legal system had adopted it also.

But it is surprising to find so thoroughly Greek a conception as that the hearth is an altar thus recognized by Judaism. The use of the hearth for this purpose is explained in the distinction which Woess points out between the refuge of a suppliant at any holy place, and the refuge to legally recognized asylums.[92] Every person who fled to an asylum was a suppliant, but in case an asylum was too remote suppliants might flee to any sacred spot

[89] *De Virtut.*, 124.

[90] Lipsius, *Attisches Recht*, pp. 643; 428, n. 33. The Greek parallel was pointed out by Cohn in *Philo's Werke*, II, 350, nn. 1, 2. On the Roman right of slaves to flee to a sacred statue see Seneca, *De Clementia*, I, 18.

[91] *Das Asylwesen Aegyptens*, p. 175.

[92] *Ibid.*, pp. 75 ff.

or altar or temple where the protection afforded was perfect, though not so satisfactory as at an asylum which was regularly provided with means for taking care of the suppliants while they remained there. But in cases of emergency suppliants often rushed into houses to cling to the family altar, and Woess thinks that it was because such invaders were so great a bother to the family, and so difficult to eject, that families came to build altars out in front of their houses, where the fugitives would stop.[93] Jews could obviously not protect themselves with such altars, yet since suppliants fleeing for their lives would hardly stop to inquire the religious tenets of the inmates of a house they might rush to, and since Jews could not appear less humane than their neighbors, some basis for the protection of the suppliants had to be found. Philo tells us what that basis was; the Jews had taken over bodily from their pagan neighbors the idea that the hearth was an altar, although there is no justification for such an idea in Jewish tradition. Yet so familiar a part of Jewish life in Alexandria had it become that the conception attached itself to, and even was explained as a part of, the Torah itself. The law gives us one of the particularly striking instances of the assimilation of Hellenistic practices and conceptions into Jewish life and thought. And it is one of the passages where it seems most difficult for me to imagine Philo's having evolved the whole passage to expound the biblical text. It seems obviously the way Jews at Alexandria met and explained the entire problem of fugitive slaves and their treatment.[94]

By a curious transposition Philo now goes on to discuss the law of inheritance. For the laws of slaveholding end in the Torah with a statement about the right of children

[93] *Ibid.*, pp. 86 f.
[94] On Sanctuary see further, pp. 118 ff.

to inherit the father's slaves.[95] So without more ado he begins a general treatise on inheritance, where he again shows strikingly the assimilation of Alexandrine law into the Jewish jurisprudence.

The specific commands of the Old Testament about inheritance Philo represents as an oracle given to Moses to guide him in settling the plea of the daughters of Zelophehad, who came to Moses and the other heads of Israel to ask that they be given the right to succeed to the inheritance of their recently deceased father. Their plea is based upon the right of the father to a succession of posterity even though he has no sons. This plea is upheld, and the daughters are granted "the possession of an inheritance" of their father. God then proceeds to define the general order of inheritance in the following way: first, the son or sons inherit; second, the daughter; third, brothers; fourth, uncles on the father's side; fifth, the next closest of kin.[96] In another scriptural passage[97] the principle seems to be laid down that the eldest son has a double portion in cases where the father has taken a second wife and neglected the eldest son by the first wife.

In Philo's version of the law these simple prescriptions are much elaborated. In a normal sort of inheritance the son is definitely made the true heir of his father,[98] and the Torah is expanded to provide that the eldest son always be given a double portion of the inheritance (§ 133). Slight as the changes here are, they are both in the direction of Graeco-Egyptian law. For while classic Greek law also gave the eldest son a double portion of the inheritance,[99] it is now known that this same custom was

[95] Lev. 25. 44-46.

[96] Numbers 27. 1-11.

[97] Deut. 21. 17.

[98] *Spec. Legg.*, II, 124: *διαδεχόμενοι τὰς οὐσίας καὶ τὴν τῶν τετηλευτηκότων τάξιν ἐκπληροῦντες.*

[99] On Greek inheritance law see Hermann-Thalheim, *Lehrbuch der*

carried over into Ptolemaic Egypt, where the eldest son's double portion was technically called the διμοιρίον.[100] It is then clear that Philo has here again resorted to allegory in order to read back into the Scriptures a Ptolemaic law which had forced itself upon Jewish practice. The eldest son, he rationalizes, should have a larger share of inheritance because he it is who first makes the parents to be parents, and provides them with posterity. But then Philo goes on to discuss the biblical passage of the man with a second wife who must provide a double portion for the eldest son by the first marriage. Here Philo defends the scriptural provision by moralizing the situation, and representing the law as a punishment for the father for his lust in taking a second wife when he already has an heir (§§ 135-139). Heinemann accordingly notes *ad loc.* that Philo intended his general statement that the eldest son has a double portion to apply only when the father had thus married a second time. But I cannot agree. Without any scriptural warrant Philo has deliberately inserted the Greek idea of inheritance into his account of the law, and justified it on general, naturalistic, grounds. If, then, he goes on to quote the law of the husband with the second wife, he does so without making any legal inferences from it whatever. He quotes it, only after he has stated his law from Ptolemaic procedure, because it is the nearest thing he could find in Scripture to the law he was enforcing.

In justifying the biblical provision giving the inheritance to daughters, lacking sons, Philo discusses the prece-

griechischen Rechtsalterthümer, pp. 61 ff.; Lipsius, *Attisches Recht*, pp. 537 f.; Thalheim, *s. vv.* Ἐπίκληρος and *Erbrecht* in Pauly-Wissowa, *Real-Encyc.*, VI, 114, 391.

[100] Mitteis, *Grundzüge und Chrest*, II, i, 234; Pauly-Wissowa, *Real-Encyc.*, VI, 391. Professor Harmon in *Yale Classical Studies*, II, 1929, will finally bring out decisive evidence for the Ptolemaic law. See also Hans Kreller, *Erbrechtliche Untersuchungen auf Grund der Gräko-Ägyptischen Papyruskunden*, 1919, pp. 153 ff.

dent of the daughters of Zelophehad in strictly Greek fashion. For he explains in one passage that daughters do not have the inheritance in full possession, but only as an external ornament,[101] a conception which he justifies from the fact that the scriptural word here for the passing on of the inheritance means "to adorn with" as well as "to confer upon." What Philo can possibly have had in mind in making such a distinction is clear from Greek law, and only so. For in Athens when a daughter inherited her father's property, that property did not, like the rest of her possessions, belong to her husband. He had only the use of it until their son became of age, and himself took over the property.[102] But that this grandson of the deceased might properly become his heir he would be adopted in the name of the grandfather to be the direct descendant and heir of the grandfather's position and name, even though such adoption had to be done after the grandfather had died. Thus, the property and social position of the grandfather found through the daughter continued identity in the grandson. But it is clear that inheritance by the daughter was not properly to be called inheritance at all, for it was only a system of holding the estate in trust until a true heir in the full sense could be found. At the bottom of this whole Greek law lies the basic conception of inheritance in Greek jurisprudence that an heir's function was primarily to carry on the deceased's position in society, and that his getting possession of the property was only part of a larger sort of succession. That Philo was aware that his conception of daughters as heirs was a part of this

[101] *Vit. Mos.*, II, 242, 243. περιτιθέναι τὸν κλῆρον ὡσανεὶ κόσμον ἔξωθεν, ἀλλ' οὐχ ὡς ἴδιον καὶ συγγενὲς κτῆμα. The peculiar use of περιτιθέναι for inheritance, or its Hebrew prototype, was later made the subject of rabbinical speculation, but not after Philo's Greek tendency. See Ritter, *Philo und die Halacha*, p. 95.

[102] Lipsius, *Attisches Recht*, pp. 543 ff.

larger conception appears in the fact that in one passage where he speaks of this petition of the daughters of Zelophehad he says that they wanted the father's property so as to be able to carry on his τάξις,[103] and in the other his ἀξίωμα,[104] whereas the original account represents them as asking only to be able to carry on his "name."

Greek influence is clear as well in the inheritance provided for unmarried daughters when there were also sons to inherit the property.[105] According to Jewish law these were not provided for at all, since all inheritance went to the sons if there were any. Ritter points out that halachic tradition provided that these be given no inheritance, but that the brothers be responsible for supporting her and furnishing her with a dowry out of their own pockets equal to the dowries which their father provided for the elder sisters during his life. If there were no such precedent, the girl was to have as dowry a sum equal to one-tenth of the father's estate.[106] But Philo surprisingly gives such a daughter an equal share in the inheritance with the sons; he regards her as the ward of her brothers, who after they have educated and protected her must marry her off suitably, if possible to a relative, but in any case within the same deme or phyle. Heinemann has recognized that this treatment of the girl by her brothers is quite in accordance with Greek custom, whereby an unmarried daughter not so much inherited as was herself inherited along with the deceased's other liabilities, so that the successor to the father's place must fulfil the father's obligations to the girl, educate and marry her off, while the money she took from the estate as dowry was, as with Philo, to be kept within the phyle in such a case by marrying the girl

[103] *Spec. Legg.*, II, 124. See above, p. 56, n. 98.
[104] *Vit. Mos.*, II, 234. [105] §§ 125 ff.
[106] Ritter, p. 96. Cf. G. F. Moore, *Judaism*, II, 126, n. 5.

to a relative if possible.[107] Thus far Jewish and Greek law both agree with Philo. But that a girl should be given inheritance on an equality with her brothers is as surprising from the point of Greek law as from Jewish law. The married daughter, it has been seen, never inherited except to hold the property in trust for her son, yet here the unmarried daughter is given equal rights with the brothers. I should guess that the explanation is that the married daughter was considered out of the family, and only reinstated provisionally if the family were in danger of extinction. But the unmarried daughter was still a part of the family. The unmarried daughter's claim to equality may be a trace of old Egyptian law which Paturet[108] has described, whereby women have equal legal standing with men in inheritance rights, and which he shows to have influenced Greek law in Alexandria. But Philo's statement is closest of all to Roman law, as recently expounded by Kübler, whereby this distinction that the married daughter had gone out of the family, but the unmarried daughter had inheritance right as still in the family, is made clear.[109]

Philo's law suggests an influence of Roman ideas in the law of inheritance in Egypt in this respect. For while Philo's law is similar to the Roman, it is quite unlike the

[107] See Heinemann, *ad loc.*, and Thalheim in Pauly-Wissowa, *Real-Encyc.*, VI, 114-116.

[108] *La condition juridique de la femme dans l'ancienne Égypte* (Paris, 1886), pp. 36-41. A will is in existence from Ptolemaic Egypt thus dividing an estate equally between sons and daughters. Mitteis, *Grundz.*, II, ii, no. 302.

[109] "Wir sehen aus dieser Darstellung, dass zur Zeit Ciceros, in welche der Tod des Vaters der Turia fiel, die Tochter, die nicht durch Coemptio in eine andere Familie übertrat, Intestaterbrecht hatte." Bernh. Kübler, "Das Intestaterbrecht der Frauen im alten Rom," *Zeitschr. der Savigny-Stiftung*, XLI (Roman. Abt.) (1920), p. 40. See also R. Taubenschlag, "Le droit local dans les constitut. prédioclétienne," in *Melanges de droit romain dediés à Georges Cornil* (Paris, 1926), II, 510 ff.

Ptolemaic, by which a daughter had a legal right to inherit along with the sons when the father died intestate, even though such daughter had already before been provided with a dowry. When a will was made she was usually excluded, often with direct reference to her dowry.[110] But that she should have been excluded by law when there was no will, as Philo stipulates, is not Ptolemaic, and may have come from Roman influence. The fact that the unmarried daughter not only inherited, but inherited on an equality with her brothers, is important, since the papyri do not give adequate ground for concluding what was the Ptolemaic practice in this regard.[111] So in matters of inheritance Jews in Alexandria seem to have been deeply influenced by their neighbors' conceptions and procedure.

This impression is confirmed when Philo goes on to list the biblical order of inheritance as already quoted,[112] a list which he had formerly given in an earlier treatise. In one of the two lists he adds to the Torah by putting in aunts (still on the father's side) after uncles, as did Greek law,[113] and by insisting that the father inherit as the first ascendant heir, lacking descendants of the deceased, so coming before the uncles of the deceased. He makes this change in the scriptural provision on the ground that uncles have claim to inherit from nephews only by their connection with him through the father, and that hence the father should have prior claim to the inheritance.[114] Yet it is significant that before he thus argues for inserting the name of the father as the first ascendant heir,

[110] Hans Kreller, *Erbrechtliche Untersuchungen auf Grund der Gräko-Ägyptischen Papyruskunden* (Leipz., 1919), pp. 143 ff.

[111] *Ibid.*, p. 147.

[112] See above, p. 56; *Spec. Legg.*, II, 127; cf. *Vit. Mos.*, II, 244.

[113] Thalheim in Pauly-Wissowa, *Real-Encyc.*, VI, 392.

[114] Heinemann notes (*Werke*, II, 143, n. 1) that rabbinic tradition carried on this same Halacha about the father, and for the same reason.

Philo first defends its omission from the Torah because it seems to him an inversion of the order of Nature that a father should inherit from his son.[115] One who knows Philo, and who sees him thus rejecting for practical reasons a scriptural law which he defends on ideal ground would instantly suspect that he has been forced to this contradiction of himself by a contrast between actual practice in his environment and the letter of the Torah. Such precisely was the case. Whether classic Greek law knew a provision for the inheriting by a father from his son or not,[116] papyri make it beyond dispute that the father was the first ascendant heir by the Greek law of Egypt.[117] Here there seems again very clearly to be a case of Philo's law having adapted itself, not to Greek law in general, but specifically to the Greek law of his environment.

It is interesting also to note in passing that Philo seems to indicate a clan system among the Jews which was a very living part of their social organization. By Numbers 36. 7-9 it is definitely forbidden that an inheritance shall pass outside the tribe. But this meant nothing, apparently, to the translator of the Septuagint, since tribes of Israel had long since ceased to have any reality, so that the word phyle is used instead of tribe, a word which was used in translating I Samuel 10. 21, to indicate the clans into

[115] *Spec. Legg.*, II, 129-132; *Vit. Mos.*, II, 245.

[116] Discussion of this subject has become highly involved. The best guide to both sides of the controversy is in Lipsius, *Attisches Recht*, pp. 549-552. Add to his references Thalheim in Pauly-Wissowa, *Real-Encyc.*, VI, 391 ff.

[117] Pap. Flor., 86, 1-2. See Frese, *Aus dem gräko-ägyptischen Rechtsleben*, 1909, p. 54. The father was also the first ascendant heir by the order of inheritance sketched in the inscription from Doura-Europas, which may have been contemporary with Philo. See Cumont, *Fouilles de Doura-Europas* (Paris, 1926), I, 309 ff.; also in the "Syrian Lawbook," see Kreller, *op. cit.*, p. 141. Kreller, pp. 167 ff., discusses the father's inheritance right at length.

which the tribes were subdivided. Thus by the Septuagint an inheritance is not to pass out of the phyle. As Philo found the law he did not need to change it to agree with both Greek and Roman practice. Thus Philo states that when a family dies out so that there is no one to carry on the succession, the property reverts to the phyle, "for the phyle is also a sort of family in larger and more complete scale."[118] Philo's law implies a Jewish system of clans which must have had as thorough an organization as the Greek and Roman clans to have made them competent to receive an inheritance.[119] Philo's law is nonsense unless we may suppose that there really did exist an organization of Jewish φύλαι to which the regulation could correspond. Our information is, as usual, defective, but it would seem that he was speaking again with actual facts before him. For we do know that there was a group of descendants of certain Jewish soldiers who had the right to call themselves Macedonians, and that this group was a distinct phyle in Alexandria.[120] Unfortunately, this is the only phyle of which we know, but there is no reason not to think that there were others, and that for purposes of marriage and inheritance, they were regarded as a definite legal bloc.[121]

[118] *Spec. Legg.*, II, 128; cf. Plato, *Laws*, 923*a*, Vinogradoff, *Hist. Jurisp.*, II, 202 ff. "The public element in property." Roman law also provided that an inheritance not claimed by heirs passed to the deceased's clansmen. The method of distribution in such a case in Rome is not known. Cicero, *In Verrem*, II, i, 45 (115); see Roby, *Roman Private Law*, I, 221; Jörs, *Geschichte und System des römischen Privatrechts*, 1927, § 185, 1, c.

[119] Josephus has a similarly realistic reference to his phyle, in *Vita*, 1 f. Alexandrian Greeks had long been divided into clans to facilitate administration: Tarn, *Hellenistic Civilization*, p. 147.

[120] Josephus, *Cont. Ap.*, II, 4 (§ 36); cf. L. Fuchs, *Die Juden Ägyptens*, pp. 81, 97. H. I. Bell, *Juden und Griechen im römischen Alexandreia*, 1926, p. 12.

[121] Apparently by Philo's time the law of the Idios Logos was not yet in force, which said, "In cases of people who die intestate and without

In summarizing Philo's law of inheritance, one must begin with the fundamental idea that succession to property was only part of the process of succession, which really was primarily concerned with guaranteeing the continuity of the life of the family group as part of a larger group, the phyle. When the family ceased to propagate itself the property reverted to the phyle, but only as a last resort, for, of course, the continuity of the phyle itself was only possible in the continuity of its families. To continue the succession of the family, then, when the father died his property passed to all the sons, while unlike the Torah Philo provides that a double portion go to the eldest son, apparently because this son now succeeded to the father's social position as head of the family. The heirs had to carry on the family with unbroken responsibility for its liabilities as well as its assets, and so inherited the father's liability to the unmarried daughters, who, as a result of Egyptian or Roman feeling for the equality of all children in inheritance, received an equal portion with the younger sons. In addition unmarried daughters had to be cared for until they could be married off to men as nearly related as possible (always remembering the prohibited close relatives), but always to some man within the phyle. Lacking sons, married daughters could inherit, but only when sons were not in existence. Even so, a married daughter inherited only in trust for her own son, who, it may be assumed from Greek custom which Philo is following, was trained up to succeed to the place of the grandfather. If descendant heirs were lacking, the Greek, not the Jewish, order of succession was observed among the ascendants. Philo does not himself stipulate every

legal heirs, their estate reverts to the Fiscus," *Gnomon des Id. Log.* 4, cf. 9. ed. Schubart. This law obviously disregards any claim of a φύλη to inherit.

one of these details, but I think every one is justified as inference from what he does say. Viewed as a whole it is apparent that only so much Jewish law is kept as agreed already with Graeco-Alexandrine custom, and that in any case of difference the latter is always followed. The fact that Philo professes to be deriving it all from the Jewish Scriptures should not blind us to the fundamentally un-Jewish character of his results. The whole seems to me to be by no means an invention of Philo's own. Customs of inheritance, in a civilization which like the Greek and Egyptian in Alexandria nearly to the time of Philo made no use of wills, but divided estates according to ancient and undisputed custom, are only very slowly modified. Philo also makes no mention of wills, and apparently depended upon the law as he gives it for inheritance. Yet if that law were disputed it would be worthless, for the only guaranty an heir had when there was no will was in the undisputed character of the laws of inheritance. So then, either Philo is stating laws never used by the Jews, for which I can see no possible motive in his mind, or else the law as he states it was the law which had gradually come to resemble the inheritance law of Alexandria, though still the Old Testament was quoted wherever possible as its authority.

After this most important digression Philo continues to discuss the festivals.

The third festival, that of the New Moon, has no legal significance; it is simply interpreted in terms of astrological mysticism. But the fourth festival, the Passover, has in Philo's interpretation an important detail for the history of the Jewish religion which must be pointed out in passing. Philo explains the festival, not at all as is done in the Jewish tradition of the saving of the first-born son, but as a festival which was begun after the departure

from Egypt as a thank offering for delivery from the Egyptian captivity, done so spontaneously that the Jews could not wait for the ministration of priests, but each man was his own priest and sacrificed for himself.[122] Since that time, he says, the law had made it a custom that on that festival there be no need of the priest, but that every man make his own sacrifice, while each house was a temple. Allegorists, he says, taught that the ceremony was one of purification, but the picture is again clear. In spite of the tremendous migrations for this festival to Jerusalem, the great majority of Jews had to remain behind without any recourse to or hope from the sacrifices there. Hence the Diaspora had obviously developed the tradition that on this day the paschal lamb, partaken of everywhere, became the sacrifice for everyone, and so some benefit of the Jewish sacrificial system was spread to all Jews throughout the world. Certainly this view of the passover, which made the feast of tenfold significance everywhere in the Diaspora among Jews, in large measure accounts for its importance in early Christian speculation about the Lamb that was slain for all.

The fifth festival, that of the Unleavened Bread, Philo again interprets in terms suggesting a mystery.[123] For the unleavened bread is of significance to the entire human race as a symbol of attuning oneself to Nature. The same is true of the passage on the sixth festival, that of the Sheaf, in which, in accordance with prophetic Judaism, occurs a most important discussion of the Jews as the priestly nation, mediating between the God of all nature

[122] §§ 145 ff. Heinemann, *ad loc.*, points out that in *Quaest. in Exod.*, I, 10, Philo argues that there was as yet no priesthood instituted when the passover was first celebrated. But the general interpretation of the feast is the same as here.

[123] §§ 150-161.

and the human race.[124] The seventh and eighth festivals, those of Pentecost or First Fruits and the Holy Month, respectively, are similarly treated. The latter, as Heinemann points out, is so interpreted as to resemble certain Greek festivals.[125] The last two festivals, the Feast of the Fast, and the Feast of the Tabernacles, would normally have closed this section, as with them Philo has filled out his number ten. So after he has discussed their peculiar virtue in the same vein as the others, he concludes that he has demonstrated that all the festivals of the year are derived from the number seven, and hence from the commandment about the seventh day.[126] But there is still one festival unaccounted for, that of the Baskets, as he calls it, or the ceremony of offering the First Fruits. He discusses this briefly as an appendix, but first demonstrates that it is only like a festival, but is not a festival proper which would spoil his perfect total number of festivals.[127] With this he has finished his discussion of the Fourth Commandment altogether.

When Philo comes to discuss the Fifth Commandment, he does so from a Graeco-Roman basis almost entirely. Parents, he says, are θεοὶ ἐμφανεῖς, for like God they create. So while they are gods only to their own children, he seems to think of parenthood as always implying divinity,[128] or a rank between the divine and human, as he expresses it in another passage.[129] Treitel and Heine-

[124] §§ 162-175. Prof. S. J. Case's recent article on the "Jewish Bias of Paul" (*Journal of Bib. Lit.* XLVII (1928), pp. 20-31) would have been of much more value had he known that in the Diaspora there existed this conception of Judaism, which is exactly what he describes, and rightly, as the higher Judaism of Paul.

[125] §§ 176-192. See especially Heinemann's note in *Werke*, II, 159, n. 4.

[126] §§ 193-214.

[127] §§ 215-223.

[128] *De Decalogo*, 120. This is much stronger than the later rabbinical statement with which G. F. Moore (*Judaism*, II, 132, n. 1) parallels it.

[129] *Spec. Legg.*, II, 225.

mann[130] have pointed out that Philo's remarks are entirely derived from Greek, or more specifically from Stoic, conceptions. But as it has been seen that Philo accepted the idea of the family hearth as an altar,[131] it is significant that at the same time he regards the parent as a deity, though he seems inclined to regard both parents in this light, and not just the father. It is on the basis of their divine character that he represents the Fifth Commandment as a transition from commands which refer to man's relation to God, and those which define his relations with other men.[132] So it is on the grounds of gentile conceptions alone that Philo has justified the commandment to honor one's parents.

In the practical derivative statutes which define the power of parents the gentile influence continues to be as plain as in his exposition of the fundamental principle of parenthood. For the great concern of the law, he says, is that children should obey and fear their parents.[133] That they should love them is not a concern of the law, because children by nature will love their parents, but there is often need of external compulsion to make them obedient. So parents are given unlimited power over their children. Philo's own words are:

> It is right that parents should rebuke their children, and reprove them with considerable severity, and even, if they do not submit on hearing threats, to beat them, disgrace them [in what sense Philo does not say], and imprison them. But after these expedients have been tried if the children still rebel, and shake off all restraint in the impetuosity of their uncorrected depravity, the law permits that they even be punished with death, though no longer at the initiative of the father or mother alone, since the magnitude of the penalty is such that it ought not to be executed at the instance of one parent, but of them both. For it is not likely that

[130] See notes in *Werke* at both these passages.
[131] See above, pp. 54 f.
[132] *De Decal.*, 50 ff., 106 ff.
[133] §§ 239 ff.

both parents will agree in putting their child to death unless his wickedness has oppressed and dragged upon them with such a constant strain that it has conquered that steadfast kindliness toward a child which Nature implants in parents.[134]

Philo's reference is to the biblical provision that in case parents have an uncontrollable child they may bring him to the elders at the gate stating their charge against him, whereupon the elders will stone him.[135] Heinemann[136] is wrong in saying that Philo has inaccurately reproduced the biblical passage because he makes no mention of the elders' first giving the son a hearing, for the Torah itself mentions no judicial hearing by the elders, though the Jewish rabbinical tradition, which demanded that act of justice for the accused, went not much beyond the implications of the text. And it is interesting that Josephus, who alone in Jewish literature sounds a note that is comparably severe, while he too speaks of no trial of the miscreant, yet at least calls for a public execution.[137] It is further clear that such strictness would have had no inspiration from Greek legal conceptions, for, except in exposing newborn infants, the power of life and death over children was unknown in Greece.[138] Here again is a test case for Philo's calling for power of capital penalty outside of Roman control. And here again Philo is writing in such a way as to be perfectly in harmony with Roman jurisprudence. For Heinemann[139] has suggested that Philo may be echoing the Roman *patria potestas*, which he recalled was one of the first of Roman laws to have made an impression on the East, and particularly in Egypt where a similar power seems to have been long granted to par-

[134] § 232. [135] Deut. 21. 18-21.
[136] *Werke*, II, 172, n. 2.
[137] *Antiq.*, IV, 264; cf. *Cont. Ap.*, II, 206, 217.
[138] Mitteis, *Reichsrecht und Volksrecht*, p. 209.
[139] *Loc. cit.*

ents.[140] This Roman influence seems to me to be inescapable. For the parent is described in Roman terms throughout. The Torah specified beating the child as a preliminary mode of discipline to be tried before the father had the child killed, but Philo gives power also of having the child imprisoned, and in some way disgraced. In all this there is no limit set for the age of the child when such discipline can be exercised, and there is no hope for the child in any appeal from the natural feelings of kindliness of parents. For the parent is, what he is never called in Jewish writing, the god of the child, who, having given life, can even at the end take it back by executing him. Furthermore, parents have not only this rulership and governance of the child, he says, but also the ownership (δεσποτείαν), for children are the possession of their parents by two distinct claims, first their having been born as a member of the parents' household, and second their having cost the parents money (for their support), and so having been bought.[141] As such they are the slaves of their parents.[142] Both of these conceptions are familiar in Roman law. In almost the same terms Festus said, "Dux et princeps generis vocabatur pater et mater familiae,"[143] in which it is interesting to note not only the terms applied to the parents, but that both parents are included, though of course this was unusual in Roman law. In his supremacy the father was also the owner of his children in a sense so similar to slavery that in spite of the distinction between the two made by Roman jurists the term slave was actually used of children, as is illustrated by

[140] Diodorus Sic., I, 77.

[141] § 233. *Posterit. Caini.*, 109, should probably as Heinemann suggests, be amended to express the same idea.

[142] § 227.

[143] Paul Diac., *Excerpta ex Festo*, 86, 15; cf. Ulp. Fr., IV, 1: "Sui iuris sunt familiarum suarum principes, id est pater familiae, itemque mater familiae." Gaius *ap. Dig.*, L, xvi, 196.

Lactantius: "dominum eundem esse, qui sit pater, etiam juris civilis ratio demonstrat . . . nomen patris complectitur etiam servos."[144] The name father implies a master, and that implies slaves. Certainly he means that the children are the slaves of the father. The correspondence between Pliny and Trajan[145] likewise shows that it was a familiar claim in the East that the expenses of bringing up children constituted their purchase price, and made them slaves. This question arises in connection with exposed children who had been picked up and reared by strangers. Did the expense of their upbringing constitute a legal purchase, and make the children the slaves of their supporters? The question was so difficult that Pliny had to refer it to Trajan. While Trajan decided that it did not make them slaves, the correspondence shows clearly that the contrary opinion was widely current. Philo's statements, then, have been perfectly harmonized with the gentile jurisprudence of his day.

Nor can this be considered accidental, for it is certain that Philo was intimately acquainted with the details of the Roman *paterfamilias*. For only one well informed in Roman law of adoption and the rights of the father could have written his account of the actions of the Emperor Gaius in dealing with the young cousin who had been left by Tiberius coheir of the Empire[146] with Gaius. Even though the Senate had voted Gaius sole rulership, Philo explains, yet, since the boy was still technically his coheir and partner, Gaius had no power over him. So Gaius adopted the lad, and thereby got a father's power over

[144] *Div. Inst.*, IV, 3, 15 f. The foregoing references were taken from Voigt, *Die XII Tafeln*, II, 12, n. 8; see also n. 7. Cf. Jörs, *Geschichte u. System des römischen Privatrechts*, 1927, § 171, 2, 3: "Ihrem Inhalt nach war die väterliche Gewalt grundsätzlich eine gleiche schrankenlose Herrschaft wie die über Sklaven."

[145] X, 71, 72.

[146] *Leg. ad Gaium*, 23 ff.

him, for, Philo says, "by the laws of the Romans the father has unlimited power over the son."[147] It was now easy for Gaius to charge that his ward was working against him, and so, by virtue of the parental power, to demand the death penalty. In such a case no one could interfere, and Gaius dispatched the boy. Philo accurately expounds the technical aspects of this legal legerdemain, and proves thereby beyond question his mastery of at least this phase of Roman law. In still another case, to be discussed immediately, Philo displays knowledge of further details of the subject.

In view, then, of his knowledge of the Roman law, and of the close adaptation of his justification of the *patria potestas* to Roman theory, it is at once striking that Philo has omitted from his account of the scriptural law any reference to even the crude judicial process there suggested. While other Jewish tradition was elaborating this aspect of the Torah, Philo left it out entirely. In doing so, of course, he was only bringing the law as he stated it closer to the Roman practice, for it was the essence of the right of the *paterfamilias* that his right in his household was absolute.[148] And, further, Philo thereby obviates the difficulty of supposing a Jewish court with power of sentencing to death in this case. The business was transacted solely at the instigation of the parents themselves. And he calls for a truly Roman severity in the matter of what action of a child warranted the extreme penalty. For while other Jewish tradition tended to make such cases of greater and greater rarity by its extreme nicety of definition,[149] Philo's tendency is quite the other way. In one passage he comments on the old command that a child who curses his parents is to be put to death,[150] which was

[147] *Leg. ad Gaium*, 28.
[148] Voigt, *op. cit.*, II, 62 f.
[149] G. F. Moore, *Judaism*, II, 134.
[150] Exod. 21. 17; Lev. 20. 9.

in itself much too severe a law for the rabbis. But Philo makes it mean that any child who so much as speaks ill of his parents, or does anything to put them in an unfavorable light is rightly to be executed.[151] It is in connection with his comment on this law that he gives a hint as to what the Jews may have done about carrying it out. Where the Torah calls simply for death, he specifies stoning.[152] It is no coincidence, and I cannot believe it is a case of direct borrowing[153] that Josephus specifies the same mode of execution. It may well be that the parents set up a hue and cry against an offending son, who was then lynched by the community with the acquiescent sympathy of the Roman officials, who had no dream of interfering in an action quite in accord with their own principles.

Philo's emphasis upon the necessity of the agreement between parents before they could resort to extremities is not Roman, and may be a result of exegesis of the Torah, where the parents are much more commonly spoken of together than would have been done by Romans.[154] But it seems rather another hint of the influence from Egyptian

[151] § 247. This is stated still more strongly in a fragment in Eusebius, *Praep. Evang.*, VIII, vii, 2, p. 357*d*. Cohn and Wendland, *Philonis Opera*, ed. Minor, VI, 194. It is notable that Philo follows the Septuagint, which translated the קלל of these two passages, respectively, with κακολογῶν, and κακῶς εἴπῃ. I am not sure that "curse," our common English translation of the Hebrew, is not here too strong, and that the Septuagint does not represent the original intention of the Hebrew text. The restriction of the law to apply only to formal cursing may have been one of the earliest moves in the general attempt to make it "void for the sake of tradition." It is conspicuous that the Gospel of Matthew (15. 3 f.) agrees with Philo's strict statement of the law in direct opposition to the growing rabbinical laxity.

[152] The use of stoning was not, of course, uniquely Jewish. See, e.g., Thucyd., V, lx, 5.

[153] As Ritter suggested, *Philo u. d. Halacha*, p. 41. See Joseph., *Cont. Ap.*, II, 206.

[154] Moore, *op. cit.*, II, 131 f., shows that a similar tendency was marked in rabbinic tradition.

law to which reference has already been made,[155] which tended in Egypt till late Roman times to give the woman coördinate legal rights with the man.

But that Philo had the Roman custom definitely in mind in this matter is to me made certain by what he says of the scriptural command that one who has struck his parents should be executed.[156] Philo approves of this command, and holds it up as more in accord with the Law of Nature to execute a person who has perverted his life by thus attacking his parents than to assign the penalty used by certain "high officials and lawmakers" who have regard to opinion rather than to truth when they hold that a son in such a case should have his hand cut off. The term "high officials," εὐπάρυφοι, is used by Philo in two other passages. In the first he refers by it to noble Romans, friends of the Emperor Gaius, who were impoverished by the Emperor's demands for entertainment.[157] The second passage is a scathing reference to the εὐπάρυφοι who are judges who fall below Philo's standards,[158] in this case because they would give no verdict, just or unjust, without a "gift." One would strongly suspect that the reference was again to the Roman officials who were notoriously grasping of bribes from provincial litigants. We would then naturally suppose that the εὐπάρυφοι who only cut off the hand of a son who has struck his father were Romans, and all doubt is removed by the fact that this was precisely the Roman penalty for such an offense, as quoted by the elder Seneca.[159] Philo is thus openly criti-

[155] See above, p. 60, n. 108.

[156] § 243; cf. Exod. 21. 15.

[157] *Leg. ad Gaium*, 344.

[158] *Spec. Legg.*, IV, 63. See below, pp. 195 ff.

[159] Seneca Rhetor, IX, 4, *ad init.: qui patrem pulsaverit manus ei praecidantur*. Heinemann, *ad loc.*, quotes this and a similar law of Hammurabi, which latter certainly has no bearing upon Philo's passage. Heinemann says that the law quoted by Seneca was from the Twelve Tables, but Seneca does not say so, and I can find no justification for the

cizing the Roman law and administration of justice in both passages. The term εὐπάρυφοι seems to me a reference to upper-class Romans, without distinguishing those who wore the *tunica laticlavia* from those who had the *tunica angusticlavia*.[160] It is interesting to parallel Lucian's anecdote of Demonax, "Seeing one of the εὐπάρυφοι priding himself on the width of his purple stripe, he leaned over to his ear, took hold of the garment, and pointed to it as he said, 'A sheep wore this before you, and was a sheep.' "[161] It was natural that people in the East, to whom distinctions within the Roman nobility could have meant little, should have a comprehensive word for all together, and as such the "well striped" would have done very well.

But if the powers of the Roman *paterfamilias* are used by Philo as the basis of his defense of the Jewish law in the power it allowed parents over their children, one must not be too hasty in concluding that that Jewish law was itself the product of Roman influences. Indeed, Philo's law is as distinct from Roman law as from the later rabbinical interpretations of the family. The Roman law is present in Philo's writings unmistakably, but rather as

statement. No such penalty was known in Greece; see Plato, *Laws*, 881*b* ff. The penalty at Athens was perpetual exile, with death if the culprit attempted to return. Such a person was regarded as ceremonially impure in Athens, so that a magistrate who was lax in his punishment was himself liable to severe discipline. It is of course possible that Philo has reference here to a law of ancient Egypt, since Diodorus tells us that it was a principle of Egyptian law that a culprit be punished in the part of his body that had offended. See J. Dagallier, *Les institutions judiciaires de l'Égypte ancienne*, 1914, pp. 178 f. But it seems to me highly improbable that Philo should refer to Egyptians as εὐπάρυφοι.

[160] See on these terms Hula in Pauly-Wissowa, *Real-Encyc.*, IV, 4 ff. Arthur Stein, *Der römische Ritterstand* (*Münchener Beiträge zur Papyrusforschung*, 10. Heft), 1927, pp. 48 f., and index, *s. vv.* Hula points out that παρυφή is used for *clavus*, but that εὐπάρυφοι has several meanings, and advises caution. Philo's use, however, seems perfectly clear.

[161] *Vit. Demon.*, 41.

something in terms of which he is explaining an independent Jewish tradition, in order to make the Jewish custom appeal to Roman readers, than as a system to which he is forcing his Jewish law to conform.

Philo concludes the second book of the *De Specialibus Legibus* with a statement that all the first five commandments of the Decalogue carry the capital penalty. He lists several: dishonoring parents, which we have just been discussing; Sabbath breaking (§§ 249 f.); false swearing, which has also been mentioned;[162] and denying God by worshiping other gods and making idols,[163] in discussing which latter it has been apparent that only lynch law was available to enforce it. As a whole the passage is a rhetorical gesture of no historical value. Only when it can be checked by more formal legal discussion in other passages can it be used as evidence for the law of the Jews in Egypt.

[162] § 252; see above, pp. 46 f.

[163] § 255; see above, pp. 33 f.

III

THE DE SPECIALIBUS LEGIBUS

BOOK III

WITH the third book of the *De Specialibus Legibus* Philo begins a discussion directed by principles of civil rather than religious law, and at the outset cries out in protest against the necessity by which he is always being driven to this most distasteful subject.[1] After this prelude he attacks at once the next Commandment of the Decalogue, that prohibiting adultery.

He begins, as our modern law schools are finding they must begin, by orienting the law from the point of view of general sociological and ethical theory. He sees in the law primarily a rebuke of pleasure, the tyrannical ruler of the human race and of all the animal world.[2] But pleasure is of two forms, that which is in accord with the Law of Nature, namely intercourse with one's wife, which may be frightfully abused, but is never criminal, and that which is contrary to the Law of Nature, adultery. So it is against adultery alone that the law is specifically directed, for that involves an abuse of the rights of others by people whose souls must be so perverted to do such a thing that they cannot be tolerated by society, but must be punished with death as the common enemies of mankind.[3] In another passage he puts the legal justification for action in the fact that adultery is one of the worst forms of ὕβρις.[4] His reasons for introducing both these phrases are important.

[1] See above, p. 9. [2] § 8. [3] § 11.
[4] *De Decal.*, 121-131, especially 126, 129. The moral grounds on which

In Attic law adultery was a crime, like open robbery, which was considered to involve an attack against the foundations of society, and so was to be tried by public criminal procedure, γραφὴ μοιχείας, which was very similar to the γραφὴ ὕβρεως.[5] Philo's general exposition of the crime is thus quite in harmony with the Greek conception. But while provision was made for trial of adultery charges by the Greeks, the offended husband was specifically authorized to take the law into his own hands and kill the adulterer when caught in the act.[6] Certainly this is the most usual procedure in the systems of law which have fallen under Philo's observation, for in another passage he says of adultery:

> In such a case who would not kill? For while in other matters nations differ widely in their customs, in this alone do all peoples everywhere agree, in that they reckon adulterers worthy ten thousand deaths, and without allowing detected adulterers a trial they hand them over to those who have caught them.[7]

What is clearly meant is that by all the legal systems Philo knows, which must of course have included Alexandrine, Roman, and Jewish practice, the courts protected any man who killed a person found violating his marriage bed. But while what Philo says is in harmony with Greek law, the law with which in this case he is most concerned, and which he appears to be directly quoting, is the law of Rome; a judgment of Cato reads: "In adulterio uxorem

Philo disapproves adultery are surprisingly like those in a fragment from the book *On Wifely Continence* by Phintys, a female Pythagorean philosopher of uncertain date. Stobaeus, *Floril.*, 74, § 61 (Meineke, III, 64). She says that adultery is a breach of one's oath taken by those who are by nature gods (that is, it is a breach of Natural Law), and that it is the most shocking sort of ὕβρις, See also the second-century Sophist Nicostratus, *ap.* Stobaeus, *op cit.*, 74, § 65 (III, 69). Philo seems to be stating ethical commonplaces which are yet in harmony with actual law.

[5] Lipsius, *Attisches Recht*, pp. 429-436.

[6] Demosth., *Adv. Aristocr.*, 53; Lipsius, *op. cit.*, p. 616.

[7] *De Josepho*, 44; cf. Lipsius, *op. cit.*, p. 434.

tuam si prehendisses, sine iudicio impune necares."[8] The term κοινὸς ἐχθρός which Philo applies to the adulterer will shortly appear to be a term of reference to those extreme criminals whom the Roman government ordinarily took under its special supervision to make sure they were adequately punished.[9] In this case we can check him, for it is well known that the crime of adultery was reserved for trial by the Roman provincial magistrates.[10] Philo's plea then amounts to this: Adultery is a crime which would normally in any case be followed by a capital penalty, and even your own laws, Romans, allow the husband, when he has caught the adulterer in the act, to execute the penalty himself! Unless the adulterer were someone whose death the governor wanted especially to revenge, it is inconceivable but that Philo's plea would have been adequate in such a case. At least his plea, as I have reconstructed it, is identical with one quoted in the *Codex* (IX, ix, 4): "Gracchus, quem Numerius in adulterio noctu deprehensum interfecit, si eius conditionis fuit, ut per legem Iuliam impune occidi potuerit, quod legitime factum est, nullam poenam meretur." Philo does not hint at a Jewish judicial proceeding, and rightly, since a formal trial for the crime could have been heard only by Romans. So his calling for the death penalty again appears upon analysis to be only an assertion of the

[8] *Ap.* Gellius, 10, 23; quoted by Mommsen, *Strafrecht*, p. 625, n. 1, who remarks, "Schwerlich darf dies auf die Frau in der Ehegewalt beschränkt werden, zumal da das Hausgericht dem Mann die Tödtung der Frau nicht gestattet." He says that under Augustan legislation this right was withdrawn, but it must have been practiced widely even after its legal authorization had been canceled. After the above was in print I discovered the following in Quintillian (V, x, 39): "Occidisti adulterum, quod lex permittit." The decree of Augustus could not then have been enforced, and Philo's remark is quite in accord with the Roman practice of his day.

[9] See below, pp. 87, 146 ff.

[10] Mommsen, p. 696, n. 3; see below, p. 151.

Roman law as it was enforced in Alexandria. But the right to kill the adulterer caught in the act is expanded by Philo to apply to a case where there was indisputable evidence (§ 52), whereby he seems to mean that the husband might hunt out the man who had thus injured him, and kill him with impunity. One doubts whether the Romans would have tolerated this procedure.

Incidentally, Philo's remarks can, I think, legitimately be taken to fill a gap in our knowledge of Alexandrian law. In discussing the treatment of adultery in that legal system Taubenschlag[11] had only a few bits of evidence, the mention in a few marriage contracts that in case of adultery the husband could claim personal possession of the wife's dowry. Taubenschlag recognized that no general conclusions for the treatment of the crime could be drawn from these cases, but he had no further data. It seems now safe to assume that Alexandrine law countenanced the practice of the husband's killing the adulterer on the spot.[12]

But Philo has said that this out-of-hand dealing with adulterers applies only to those detected in the fact, or in case of indisputable evidence. What then should be done in case a husband only suspects his wife, but, having insufficient evidence for taking matters into his own hands, wants a trial? It is again striking that Philo grants jurisdiction to no Jewish court in Alexandria for the hearing, which in Egypt would apparently have to go before the Roman court. But if a Jew wished to follow Jewish law he might go to Jerusalem with his wife and the evidence and there go through an elaborate process. He must first take her to a Jewish court there, obviously the Great San-

[11] *Das Strafrecht im Rechte der Papyri*, p. 35; Mitteis, *Grundzüge*, II, i, 216.

[12] See also below, p. 239.

hedrin which the Halacha specifies for such litigation,[13] where he makes his full statement and shows his evidence. If he cannot make a case, and she persist in asserting her innocence, he may, if still unconvinced, take her to a priest, with a bit of barley as an offering. The priest mixes into a jar of fresh water some dirt from the floor of the temple. When all is ready the woman, with bared head, advances to the altar where the priest explains to her that she must drink the mixture he has made, and that if she is guilty it will curse her. Then he writes this same explanation on a bit of papyrus and puts it into the mixture, apparently to instruct it as to how to act, and hands it to her to drink, after which she returns home. Some time later the result will appear. If she is guilty her body will swell and her womb be visited with some unnamed but frightful affliction, if she is innocent she is benefited by being made more fruitful. This ordeal is an adaptation of Numbers 5. 11-31, but altered in many respects. It is not necessary to analyze these changes here, nor to discuss the differences in detail between Philo's account and the Tannaitic tradition, for the rite was never a part of the Jewish law of Alexandria. Suffice it to say that his account seems to be of a ceremony which was definitely being practiced in his own day. But it could hardly have been of great practical importance to Jews in Alexandria except to those wealthy enough to make a trip to Jerusalem and carry on an expensive suit there. We unfortunately do not know what ordinary people did in such circumstances, though presumably they would have appealed to an ordeal by oath,[14] if they did not want to take the case to the Roman magistrate.

[13] Heinemann, *Werke*, II, 199, n. 2, has an excellent comparison of Philo's version of this law with the Halacha, in which it appears that this is the only real agreement between the two.

[14] See below, p. 186. It is, of course, possible that the whole ceremony

It is characteristic of Philo that in describing this ordeal, which is in the Torah a direct appeal for God's decision, he should characterize the process as an appeal "to the tribunal of Nature."[15] Heinemann points out at the passage that in this case φύσις is only the conventional Stoic locution for God, and it is true that Philo goes on immediately to speak of God as personally deciding the case. Yet to Philo, as a jurist writing with Greek and Roman jurists in mind, the whole procedure would take on much more dignity if it were regarded as an appeal from the written code to the Law of Nature.

Philo gives us no satisfactory discussion of divorce. Apparently it was practiced in his society on a number of grounds, as it was permitted in Jewish society generally in his day.[16] If the wife were barren she properly ought to be divorced, since intercourse was sinful on any other pretext than the begetting of children, but one who does not divorce a woman whom he married as a virgin, and has loved for years though she has proved barren, must be excused if he have not the will power to compel himself to do so.[17] There were, of course, other grounds for divorce,[18] but they are not specified.

Closely allied to adultery proper Philo considers to be all those perversions of normal sexuality which we, like Paul and Philo, still call unnatural. These, he thinks, always bring upon themselves that divine punishment which ever stalks after those who, however unwittingly, break natural laws.[19]

One of these crimes is incest, and first, following the

was practiced at the temple at Leontopolis. But Philo never refers to this temple in any of his writings, and apparently its validity was not recognized by his group.

[15] § 52.
[16] G. F. Moore, *Judaism*, II, 122 ff.
[17] § 35.
[18] § 30.
[19] § 19.

order of treatment in Leviticus 18, the connection of a parent with his or her own child. Such a relationship, he says,[20] is permitted and even honored among the Persians, but wherever it has been practiced it has always been followed by catastrophe, as appeared in the tragic case of Oedipus, and in the constant upheaval and warfare which characterized Persian history. So it seems to Philo an excellent feature of the Mosaic code that it specifically prohibits such a relationship.[21] In looking to divine action for the sanction of this law, when punishment is not mentioned in the Torah, Philo is standing on Greek ground. Plato regarded the prohibition of incest as one of the ἄγραφοι νόμοι which needed no civil sanction since those who were guilty, even inadvertently, always suffered terrible calamities as a result.[22] Socrates in Xenophon's tradition is more rationalistic in seeing the calamity take the form of misbegotten children, but is no less sure that the misfortune is an automatic reaction from a broken law of the gods.[23] As to marriage of a sister and brother Philo is aware that Jewish law is stricter than the laws of other nations. He quotes Solon's prohibition of marriage between full brother and sister, but permission of marriage between half-brother and half-sister who have a common father.[24] He also states that the Spartans had a similar

[20] §§ 13 ff. Mangey gives several references to parallel this statement; a few are: Xanthus, *ap.* Clem. Alex., *Strom.*, III, ii, 11, 1 (ed. Stählin, II, 200, lines 20 ff.); Sext. Emp. *Pyrrh. Hypot.*, III, xxiv, 205; *Clement. Recog.*, IX, xx; Jerome, *contra Jovinianum* II, vii; Migne, *P.L.* XXIII, 296. See also *Letter of Aristeas*, 152, and Kornemann, "Die Geschwisterehe im Altertum," *Mitteilungen der Schlesischen Gesellschaft für Volkskunde*, XXIV (1923), 28; Rapp, "Die Religion und Sitte der Perser und übrigen Iranier nach den griechischen und römischen Quellen," *Zeitsch. der deutschen morgenländischen Gesellschaft*, XX (1866), 112 ff.

[21] Cf. Euripides, *Andromache*, 174-177.

[22] *Laws*, 838*a* ff.

[23] *Memorabilia*, IV, iv, 20 ff.

[24] §§ 22 ff. I have not found this in Solon himself, but for the Athenian law in general which Philo has accurately reproduced see Lipsius, *At-*

law, but reversed, permitting marriage between half-brother and half-sister only when the parent they had in common was the mother.[25] The Egyptians, always symbolic to Philo of fleshly lasciviousness, open themselves conveniently to his scorn at this point because of their law permitting "a man to marry all of his sisters, by either or both parents, and whether younger, or older, or even a twin.[26] Philo highly approves Moses' prohibition of marriage between brother and sister of any sort.[27] In justifying the prohibition of marriage between the other specified relationships of the Jewish law, Philo falls back again upon the Socratic argument from natural relationships, which should not be confused (§§ 26 ff.). Marriage with a Gentile Philo as a pious Jew regards with great concern (§ 29). As Heinemann points out at the passage such marriage was not specifically prohibited by the Torah, but only marriage with certain local tribes;[28] yet, as Josephus shows, the more general interpretation was already current.[29] But the prohibition of such mar-

tisches Recht, p. 476. See especially the passages referred to by Heinemann: Corn. Nepo, *Vit. Cim.*, I, 2; Schol. to Aristoph., *Nubes*, 1371. Professor Ferguson reminded me that the name of Solon was frequently applied to fourth-century Attic law. Intercourse between brother and sister is prohibited by Plato, *loc. cit.*

[25] I have been unable to find supporting evidence for this statement of Philo's, but think from the accuracy of most of his remarks about law, as evidenced by the foregoing, that the law can be assumed to have existed.

[26] § 23. The Egyptian custom is familiar. For a card of invitation issued by the mother for the marriage of two of her children together as late as the third century see Mitteis-Wilcken, *Grundzüge u. Chrest.*, I, ii, no. 484; cf. *ibid.*, II, ii, no. 313; II, i, 213, n. 3. It is incidentally to be noted that Kornemann has recently demonstrated that the "Geschwisterehe" of the Hellenistic monarchs was a copy of the Persian custom, not influenced at all by the Egyptian custom, even in the case of the Ptolemies. See Kornemann in work cited above, p. 83, n. 20.

[27] In this he was supported by Roman feeling in Egypt. See *Gnomon des Idios Logos*, § 23, ed. Schubart.

[28] Exod. 34. 16; Deut. 7. 3. [29] *Antiq.*, VIII, 191.

riage was more an advisory than a legal matter, for Philo has no mention of a penalty, but only urges parents so to train their children in the law that they will not wish to break away.[30] Another bit of similar advice is Philo's law that one must not have intercourse when the woman is menstruating, or, as already mentioned, marry a woman proved to be barren (§§ 32 ff.). But again the penalty of Nature is the only one suggested.

The absence of any provision for penalty for incest can only be explained, it seems to me, on the ground that it was an action reserved for the Roman courts. It is definitely known that both paederasty and incest were actionable in Egypt under the Roman administration,[31] though the penalty is not recorded.

Philo's silence as to legal action for incest is in striking contrast to his almost bloodthirsty demands for penalty for other crimes of "unnatural" lust. For example, the Torah forbade a woman who had been divorced from her husband for any cause and married to another man to return to her first husband,[32] even though her second husband should die. No penalty is fixed in the Torah to the breaking of this law, and Heinemann points out that according to the rabbis and Josephus[33] such a marriage was simply called invalid. Yet Philo thunders out a demand for the death penalty for the offense, and justifies his demand by representing the act as a combination of adultery and pimping (§ 31), the former of which by all law, the latter by Greek law, were capital crimes.[34] In Roman law, which Philo seems particularly to have had in mind,

[30] For instances of such mixed marriages see Juster, *Les Juifs dans l'Empire Rom.*, II, 45, n. 5.

[31] Taubenschlag, *Das Strafrecht im Rechte der Papyri*, p. 95.

[32] Deut. 24. 1-4.

[33] *Antiq.*, IV, 253.

[34] On adultery see above, pp. 77 ff. On pimping see Lipsius, *Attisches Recht*, p. 435.

it was pimping to condone adultery, even the adultery of one's wife, and what Philo means is that for a husband to take back a wife who has lived with another man is for the husband to condone her in promiscuity and adultery.[35] Apparently, local Jewish feeling regarded this act with such abhorrence that its perpetrator, if not lynched, was likely to be condemned to death in the local court, which had to appeal in these Roman terms for a ratification of the penalty before the Roman court, where Philo would have quoted the *Lex Julia.*

With Deuteronomy 23. 17-18 in mind Philo now proceeds to treat of sodomy, buggery with animals, and prostitution (§§ 37 ff.). The Torah reads: "There shall be no prostitute of the daughters of Israel, neither shall there be a sodomite of the sons of Israel. Thou shalt not bring the hire of a harlot, or the wages of a dog, into the house of Yahweh thy God for any vow: for even both these are an abomination unto Yahweh thy God." The words for prostitute, male and female, were the words used for the temple prostitutes of the heathen, and the law simply means that such an institution shall not be tolerated as a part of the worship of Yahweh, nor their wages used to support the cultus in any way. "The wages of a dog" are the hire of the male prostitute.[36] Philo, to whom the real meaning of the verse is of course not known, understands it as a demand for the execution of male and female prostitutes, and of those who have intercourse with animals, taking the most extreme view of οὐκ ἔσται. The sin of sodomy he treats most brilliantly, for his descrip-

[35] On pimping in Roman law see Mommsen, *Strafrecht,* pp. 699 ff. Of the several laws quoted there the one nearest Philo's point of view is a definition of pimping as: *si adulterii damnatum sciens uxorem duxerit,* quoted by Tryphonius from the *Lex Julia* (B.C. 18) in *Digest,* IV, iv, 37, 1. The penalty was to be the same as for adultery.

[36] See Bertholet, *Deuteronomium, ad loc.*

tion of the painted male prostitutes, who take part even in the mysteries of Demeter, is an important document for the social history of the day. He demands the death penalty for a Jew who falls into this sin with his familiar call for lynching; such a person "shall be killed without the slayer's incurring thereby liability, and allowed to live not only not a day, but not even an hour, since he is a disgrace to himself, his house, his country, and to the whole human race" (§ 38). Similarly, the paederast is to have the same punishment, for he too is a social menace, since he threatens the country with sterility, and is "a public horror and pollution." Again, we have the word κοινός appearing to justify a call for lynching.[37] In asking for the death penalty Philo is quite in accord with the Greek law,[38] and with the Roman-Egyptian law,[39] though in Alexandria it had obviously fallen into disuse from what Philo says. Philo would have seemed to his contemporaries only to have been calling for a more strict enforcement of the recognized penalty, and to have been asking Jews in the case of Jews to take matters into their own hands, not by legal process, but by lynching. The whole is worked out on proper legal grounds, and sounds most realistic as he describes the process.

In still more indignant vein he attacks human commerce with animals (§§ 43 ff.), on the ground that it is a horrible perversion of Nature which was visited in the Torah with the death penalty for both the man and the beast.[40] He apparently intended this penalty to be visited in the same way as the preceding, for he makes no men-

[37] See above, p. 79, below, pp. 88, 148 ff.

[38] Lipsius, *Attisches Recht*, p. 437.

[39] Taubenschlag, *op. cit.*, p. 95; Mommsen, *Strafrecht*, pp. 703 f.

[40] Lev. 20. 15 f. Philo says the Jews were very careful in observing even the prohibition against crossing different kinds of animals, as in the breeding of mules. This law was advisory.

tion of legal procedure, though he does call the crime ὕβρις. One has to go no farther than the romance of Apuleius to suspect that in the life of his time Philo is not inveighing against phantoms.

Ordinary prostitution was held to be a much more serious offense in Philo's opinion than seems to have been the case in any other Jewish tradition. He would have all harlots stoned to death as public menaces for having perverted their natural gifts.[41] Again the call is for lynching, and again on the ground of the culprit's being a public enemy. Such a law certainly had not Graeco-Alexandrine or Egyptian inspiration, while Ritter points out that it had no real basis in the Torah, and no parallel in rabbinic tradition.[42] Ritter concludes that it must have been an actual law in use in Alexandria, because he can find no other source for it. It is quite likely that he is right, and that stricter Jews would have carried out such a penalty when possible. That it was invariably enforced is quite another matter. But the legal picture of the Jewish attitude toward sexual irregularities is on the whole quite convincing. The strictest penalties, enforced usually by lynch law, but always with the legality of such lynching from the point of view of Roman law in mind, were demanded, and probably, on the whole, enforced. The Jews, as is well known, were morally a marvel to their neighbors, and to keep their moral tradition intact were probably most severe in punishing those who fell. Philo's indignation at the looseness of the life about him can be taken as typical of the attitude of the rulers of the Jewish nation in the city; and their laws, which seem more strict than the Palestinian tradition, may well have been

[41] § 51; ὡς λύμη καὶ ζημία καὶ κοινὸν μίασμα καταλευέσθω. Cf. above, pp. 79, 87; below, p. 148.

[42] *Philo und die Halacha*, p. 93; though Philo may have had also Deut. 22. 21 in mind.

evolved in reaction from their environment. Such at least seems to me to be the only proper interpretation of these sections of Philo's writing, where he speaks always in a straightforward way, without any appreciable allegorization, and always with the setting of his legislation in the Roman environment in mind. In cases of crimes like these there need have been no more reference to the Roman tribunal itself than was proposed in the gospel story of the woman taken in adultery.[43]

In passing, and to strengthen his protest against sexual irregularities, Philo says that so strong is the Jewish feeling against intercourse even between man and wife that it requires that both parties rise and wash after a connection.[44] This seems not to have been strictly required by the rabbinical tradition, according to Heinemann, but its mention here and by Justin Martyr[45] shows that it was one of the cardinal laws for Jews in the Diaspora.[46]

The next question Philo raises is whether an attack upon a widow should be considered as adultery or not. Philo's judgment in form and substance is that of a professional jurist:

> If any one forcibly dishonors (*βιασάμενος αἰσχύνῃ*) a woman who has been widowed either by the death of her husband or by some sort of divorce, he has committed a lighter offence than adultery, about one half as serious, and so shall be relieved of the death penalty. But since he has regarded the most base things as the most desirable,[47] let him be indicted for forcible deprivation (*βίαν*),

[43] The fact that the story has poor manuscript tradition for belonging in the Gospel of John makes it none the less good evidence for legal assumptions of the day. It was just another case of a Jewish lynching party, and whether it actually happened with Jesus taking the part he is reported as taking, or is only a pious story, its legal assumptions of what was possible to have happened are of equal validity. Of particular significance is Jesus' emphasis on the "first stone." By Jewish law the accuser had always to throw the first stone in executions. Deut. 17. 7.

[44] § 63; cf. Lev. 15. 18.

[45] *Dial. c. Tryph.*, XLVI, 2.

[46] See below, p. 144.

[47] Cf. *De Decal.*, 123.

contumelious assault (ὕβριν), criminal lack of control (ἀκολασίαν), and actionable impertinence (θράσος), and let the judge decide in his particular case whether he is to be punished in person or by a fine. (§ 64.)

It is notable that this is a bit of legislation with no biblical precedent at all, and explained entirely in terms of Greek legal principles. Plato speaks of the ὕβρις and ἀκολασία of young men as the outstanding instance of crimes of βία, though he has in mind particularly their tendency to irreverence toward the gods and sacred objects,[48] while rape was in Attic law indicted with δίκη βιαίων, to be punished by fine. The penalty seems to have varied in Greek law in different periods, but, so far as is known, was always a fine.[49] In Alexandria and the Greek law of Egypt in general there is no direct parallel to this law. But in the Alexandrian Code ὕβρις is defined in such a way as to cover all acts of personal violence, with the amount of penalty left open to the discretion of the judge,[50] both in the Ptolemaic and Roman periods, while there is evidence to lead one to suppose that there existed in the law of the χώρα a plea for personal violence which was called δίκη βιαίων[51] and which seems more like the Alexandrine plea for ὕβρις than for βία, for the latter involved a combination of personal and property damage.[52] Philo's law seems to be an independent tradition which was evolved in the Alexandrine Jewish courts for an offense which could not be classed properly as robbing

[48] *Laws*, 884.

[49] Lipsius, *Attisches Recht*, pp. 259, 638. The law of Gortyn stipulates a definite tariff in connection with rape. Vinogradoff, *Historical Jurisprudence*, II, 193. Βία and ὕβρις are discussed more at length below, pp. 233 ff.

[50] Graeca Halensis, *Dikaiomata*, p. 107, ll. 210 ff. Cf. Taubenschlag, *Strafrecht*, pp. 17 ff., 81 ff.

[51] Meyer, *Juristische Papyri*, p. 239; cf. Partsch in *Archiv*, VI, 58, n. 1.

[52] Taubenschlag, *op. cit.*, p. 21.

a virgin of her virginity, or as adultery, but yet which clearly called for judicial action. The Jewish courts had come to treat it as calling for a fine on the principle of assault and personal damage, as Philo has explained. That Philo has himself originated this law seems to me not remotely likely. If he was thinking in terms of scriptural exegesis he would have had no occasion to invent such a law, and he seems not to be going into legal casuistry for its own sake at any point. He has no reference to Roman law in explaining the action because no such reference was necessary. Taubenschlag[53] has shown that in actions for assault the Ptolemaic forms persisted almost unchanged under Roman rule until the Byzantine period, so that in explaining the case in Greek terms Philo has met the requirements of his environment.

Similarly, Greek tradition has clearly influenced the treatment of the man who has raped or seduced a virgin (§§ 65-71). The biblical legislation on which Jewish tradition for such a case was based is found in two passages. One passage states that the man who seduces a virgin must marry her, and himself furnish her with her dowry; if her father refuses to accept him as a son-in-law the man must still supply the girl's dowry to permit her to marry someone else.[54] The other passage prescribes the flat sum of fifty shekels of silver payable to the father, while in addition the offender must marry the girl without any right ever of divorcing her.[55] This Jewish material could easily be reconciled with Greek practice. Philo puts the initiative of action directly into the hands of the father, as Greek law specified, and as this Jewish law implies.[56] He does not, like Josephus,[57] retain the fixed scrip-

[53] *Op. cit.*, pp. 81 ff.
[54] Exod. 22. 16, 17.
[55] Deut. 22. 28, 29.
[56] Lipsius, *Attisches Recht*, p. 638.
[57] *Antiq.*, IV, 252.

tural fine of fifty shekels, but leaves the sum open, apparently to allow it to conform to local practice. No change was necessary in the biblical provision that the offender should pay the dowry to the woman, for in Graeco-Egyptian law the dowry always remained through life the property of the woman.[58] Philo adds further to the Torah that if the girl is an orphan she shall have the right to speak for herself as to whether or not she will take the man. It is notable in this connection that Philo does not stipulate that the girl is to be represented by a κύριος if the father is dead, an omission that shows that he was thinking rather in terms of Graeco-Egyptian law than of Attic law, for it has been shown that the right of a woman thus to act legally for herself was a feature found in the ancient world uniquely in Hellenistic Egypt,[59] but Philo correctly calls the crime βία, stating that it involved the seizing and ruining of the girl,[60] and as a result, if the man was rejected as a husband by the girl's father, or by the girl herself, he was to pay a fine in addition to furnishing her dowry.

In connection with another type of adultery Philo gives insight into a very important aspect of the Jewish legal adaptations in Egypt. In discussing adultery Deuteronomy has a passage (22. 23-27) in which is treated the crime of raping or seducing a virgin formally betrothed. The biblical law is chiefly concerned with the problem of ascertaining the guilt of the girl, since the man is to be stoned in any case as having "humbled his neighbor's wife." The girl is also to be stoned if the connection took place in a city, on the supposition that she might there

[58] Mitteis, *Grundzüge*, II, i, 220.

[59] E. Revillout, *Precis du droit Égyptien comparé aux autres droits de l'antiquité*, 1899, pp. 1098 ff.; see especially the conclusions on pp. 1113, 1114. Mitteis, *Reichsrecht und Volksrecht*, p. 54.

[60] See below, pp. 235 f.

have got help had she cared to cry out, while her innocence is presumed in the country, since in a remote place she could not have got help had she tried. The crime is assumed to be adultery, with the full Jewish penalty.

With this passage in mind Philo writes as follows:

> Some people regard the crime of ὑπογάμιον as being one midway between deflowering a virgin (φθορά) and adultery, when, in the case of couples who have formally executed[61] covenants (ὁμολογίαι), but have not yet completed the marriages (μήπω τῶν γάμων ἐπιτελεσθέντων), some other man, by craft or violence comes into relations (with the woman). But in my judgment this is a form of adultery. For when there is a public record made (ἐγγράφεται) in the name of man and woman (ἀνδρὸς ὄνομα καὶ γυναικός), as well as of the other matters which relate to unions (ἐπὶ συνόδοις), the covenants (ὁμολογίαι) have the force of marriages (γάμοις ἰσοδυναμοῦσιν). Wherefore the law orders both to be stoned if with one and the same mind they agreed to commit the crime. (§§ 72, 73.)

Philo now goes on to discuss the biblical test of the guilt of the woman, to which I will return. But the statement quoted is arresting. For here Philo has obviously much more in mind than the simple betrothal of Deuteronomy, according to which the girl was μεμνηστευμένη. Philo does not use this word at all, but in its place gives a specific description of a contract of union in which, first, the binding document is a ὁμολογία; second, the couple is registered as ἀνὴρ καὶ γυνή; third, other matters are arranged; on the basis of which, fourth, there may be σύνοδος, sexual relations; fifth, this document is publicly registered; yet, sixth, marriage is a further step, another and distinct process. Consequently, some lawyers, with whom Philo does not agree, call infidelity to this contract a matter which lies midway between the deflowering of a virgin (which ὑπογάμιον is not) and full adul-

[61] ὑπερεγγυήσωσι, a word not given in Liddell and Scott, and not found in the papyri.

tery. On the contrary Philo thinks that since the contract is a *de facto* marriage, the crime is *de facto* adultery, and should be so treated.[62]

Heinemann, at the passage, recognizes that such a marital relation is not Jewish, and compares it with the Greek betrothal contract.[63] But in the last few years new papyri material has appeared which brilliantly illuminates Philo's meaning.[64] Marriage in Graeco-Egyptian law, we now know, had two possible (or customary) stages. The first was made under a covenant of marriage, ὁμολογία γάμου, or συγγραφὴ ὁμολογίας, by which intention of marriage was declared, the dowry was agreed upon, and completion of marriage, συγγραφὴ συνοικεσίου, was guaranteed. Marital relations might begin on the basis of the ὁμολογία (the couple "came together," συνεῖναι, clearly the equivalent of Philo's σύνοδος). In one instance this relation was contracted to last not more than a year, by the end of which time the full marriage was to have been completed. Apparently, like any contract, the ὁμολογία might at any time be nullified by mutual consent; but it was binding on either party at the will of the other. The pair lived together ὡς ἀνὴρ καὶ

[62] It is true that as Philo goes on to discuss the scriptural criterion for the guilt of the girl he does speak of her as defending her virginity (§ 74). But I think this is a reflection of the biblical language, and does not conceal the real situation which he implies by the term ὁμολογία.

[63] Mangey points out at the passage that a later Roman deduction from the *Lex Julia de Adulteriis* took the same position: "Divi Severus et Antoninus rescripserunt, etiam in sponsa hoc idem vindicandum, quia neque matrimonium qualecunque, nec spem matrimonii violare permittitur." *Dig.*, XLVIII, v, 13, 3. This Roman law may be founded upon an older custom, and Philo's judgment influenced thereby.

[64] Partsch, *Juristische Urkunden der Ptolemäerzeit* (Heidelberg, 1927), pp. 15 ff.; Meyer in *Zeitschrift Savigny-Stift.*, Romanist. Abt., XLVIII, 603 f.; Wenger in *Sitzber. der Bayer. Akad.*, Philos.-Philol. und hist. Classe, 1928, 4. Abhandlung, pp. 68 ff.; Wilcken, *Urk. Ptolem. Zeit*, I (1927), 579 ff.; Meyer in *Raccolta di Scritti. . . . Lumbroso*, 1925, pp. 223-228.

γυνή, but the woman was not γυνὴ γαμετή, or γνησία, until after the second ceremony. Until then the man was not subject to criminal penalty for desertion, and the woman had no claim as a wife in her husband's family, and did not inherit as his wife if he died. One papyrus preserves the covenant as follows: ὁμολογοῦσιν Ἄδραστος —[καὶ Ἰσιδώρα, μετὰ κυρίου] τοῦ αὐτῆς ἀδελφοῦ [—συνεληλυθέναι ἀλλήλοις πρὸς γάμον, Ἄδραστος δὲ καὶ ἔχειν φερνὴν παρ' αὐ]τῆς χαλκοῦ νομίσματος κτλ.[65] The ὁμολογία γάμου was made before the ἀγορά̀νομος in a δημοσίον. The final contract was in Alexandria executed before the ἱεροθύται, in the χώρα before the Greek notaries, οἳ πραγματευομένοι τὰς γαμικὰς συγγραφάς.

That Philo's ὁμολογία and the marriage here described are identical seems to me quite beyond question. The two agree on almost every detail, though without the papyri material we should not have recognized the force of Philo's terms. It is this Ptolemaic preliminary marriage which Philo has fitted back into the Jewish scriptural law because, as we must conclude, it was the custom of the Jews in Egypt to make similar submarital contracts. The custom was certainly, as Wilcken suggests, a product of the influence of the Egyptian ἄγραφος γάμος upon Greek law in Egypt, though the Greek contract should not be given the name ἄγραφος γάμος because there were important differences between the Egyptian and Greek practices. But as showing the direction in which Jewish lawyers in Egypt were looking, it is interesting that Philo's law is an adaptation of the Greek, not the Egyptian, form. The τινες who treated infidelity to this preliminary marriage as being a less serious crime than adultery would seem to have been Greek lawyers. It is probable that the

[65] P. Freib. 29, 5 ff. Wilcken's reconstruction. From Meyer, *loc. cit.* See also Meyer, *Juristische Papyri*, No. 20.

term ὑπογάμιον came also from the Greek courts of Egypt, though the word has not yet turned up in any papyrus, for, in view of the extensive use which Philo in these few sentences is making of Greek technical legal terminology, it is to be assumed that he, or the legal tradition of which he is speaking, took ὑπογάμιον from the same source.

Philo classes ὑπογάμιον as ὕβρις.[66] The word βία is used in connection with it (§ 76), but in a general way (τῷ διαπραξεμένῳ τὴν βίαν ἕπεται δίκη πανταχοῦ), possibly with reference either to the fact that he has just described the girl as trying to defend her virginity,[67] or more probably in the non-legal sense of a βίας δίκη.[68] But one reason for thinking that the girl was not a virgin in the case of ὑπογάμιον is the fact that the crime is twice called ὕβρις, in § 74 and § 76. It may be that in Greek law the crime of ὑπογάμιον was regarded and treated simply as ὕβρις, in the sense in which we know it from Egypt, and that while Philo retained the term, yet, since he regarded the crime as involving *de facto* adultery as well, he adjudged the penalty for the more serious crime involved. But it seems to me much more likely that ὕβρις is here used in the same sense as when he calls adultery by that name,[69] a usage novel in Greek law.

In discussing how the crime should be treated and judged Philo, as frequently before, defends in theory a biblical procedure which he rejects in practice. For he judges that if the act were done with the girl's consent both parties would be guilty of adultery, and should be stoned. The only problem for the court, then, since the stoning under Roman law would have had to be a mat-

[66] On ὕβρις and βία see below, pp. 233 ff.
[67] Deflowering a virgin was βία.
[68] See below, p. 233.
[69] See below, p. 239.

ter of popular lynching, would be to determine whether the girl had consented or not. For determining this point the Torah had set it down as a fixed criterion, as has been said, that when the act had been done in the city, the consent of the girl must be presupposed from the fact that if she had cried out someone in the city would have heard and come to her assistance; but if it had happened in the country, only the man would be held as guilty because her cries might not have been heard. This standard of judgment Philo warmly defends as a general principle, that is as a part of the letter of the Torah, and yet he warns the judge that he must not rely upon it, but must make careful examination as well, for the girl might have been gagged and helpless, as he points out, in the city, or perfectly complacent toward the man's advances in the country. That is, for all his praise of the Torah, in a practical case Philo would have put no reliance, or paid no attention, to this scriptural criterion whatever. It is notable that Josephus and early rabbinic tradition similarly rejected this scriptural test, so that Philo seems certainly to be reflecting here the practice of the Jewish courts of his day.[70]

There is one more ruling about marital difficulties which Philo treats from the Torah. This has to do with a man who tires of his wife, and, wishing to get rid of her, trumps up the excuse that she came to him not a virgin, although she had been so represented by her father in the marriage settlement.[71] Scripture demands that when such an accusation is brought in, the father shall produce in court the evidence of her virginity, in this case her (bloody marriage) clothing. If he cannot produce ade-

[70] Heinemann, *ad loc.;* see Ritter, *Philo und die Halacha,* pp. 87-90; Weyl, *Die jüdische Strafgesetze bei Flv. Joseph.,* pp. 108-110.

[71] §§ 79-82; Deut. 22. 13-21.

quate evidence of her virginity the daughter is to be stoned as a girl who had played the harlot in her father's house; but if he does produce the evidence the slanderous husband is to be whipped, pay one hundred shekels in damages to the father, and lose all right of divorce from the woman to the end of his life. After Philo has polished this law up somewhat he finds it quite acceptable. First, he omits all reference to the garments of the girl, and simply speaks of a hearing of both sides by the supreme court of Jewish elders in full session, just as Josephus soon afterward was compelled to admit other sorts of evidence.[72] Second, he allows both parents as defendants (though Josephus speaks only of the girl's father, or brother, not the mother), on the ground that the threat is against them both, again with a reflection of the Egyptian tendency to regard the woman as a legal person on a par with her husband. Furthermore, he allows, in case the bride is vindicated, that she may continue to live with her precious husband or not as she chooses, and, if she does not want him again, she may be free. But if she does still want him, she may have him, and, as in the Bible, the husband has lost all power of divorcing her for the rest of her life. This forcing of the husband to keep the undesired wife Philo quite accurately calls the worst punishment of all which the man is called upon to undergo. Again the influence of the Egyptian attitude toward women in the courts is unmistakably felt, for early Jewish law knows no such right for the woman.[73] And again the fixed scriptural fine is changed into a demand simply for a fine. But if the husband wins his suit there is no reference to stoning the girl. If the omission is of any significance, apparently she simply got a bad name, while the

[72] Heinemann, *ad loc.; Antiq.*, IV, 246.
[73] Heinemann, *ad loc.*

penalty was adjudged against the parents on the basis of fraudulent misrepresentation, probably a heavy fine.

So far, obviously, the old tradition has been whipped into shape by competent jurists to make it equitable law according to the standards of Hellenistic Egypt. For the rest the biblical form of procedure stands, even to the assigning of a double penalty, whipping and a fine, for the same offense, contrary to the best traditions of Greek jurisprudence.[74] Philo may have been aware, and taken comfort from the fact, that in Roman law of *injuria* an attack upon a daughter might be regarded as basis for a double action, for injury against the girl, and for injury against the parents.[75] But this point was rather a fine one, and was apparently ignored by the Jewish courts.

With this law Philo has finished what he has to say about adultery and the laws derivative therefrom. In the whole section he has given a vivid picture of Jewish sexual standards which, in sharp contrast to those of his environment, were very strict indeed. So far as possible the Jewish law is followed, but followed as a jurist would follow his code, rather than as an exegete would expound the letter of Scripture. All fixed fines set in the Torah are either put over into Alexandrine currency, or, more usually, left to the discretion of the court. The influence of Egyptian legal equality of womanhood is everywhere apparent in a way a philosopher in his study would not have introduced it, but as social pressure of generations would have made itself felt. Still, the penalties have the violence of the old tribal laws, but they are always, if the call is for a capital penalty, either definitely to be executed in lynchings, or the ground of appeal to the Roman court for

[74] In *Adv. Leptin.*, 155, Demosthenes quotes a Greek law specifically prohibiting this combination of penalties.

[75] Roby, *Roman Private Law*, II, 223 f.

ratification is indicated, or both. Yet Roman law shows no influence in cases like rape, where the action would be on the Greek basis of assault which persisted in use in Egypt centuries after the Romans took control. That is, while the basis is the Torah in all this legislation, it is the Torah modified here by Roman, here by Greek, here possibly by Egyptian, influences in a way that only could have taken place through long influence upon practical decisions.

Philo turns now to the commandment, "Thou shalt not kill," and its derivative statutes, which, as it concerns a crime that would have been watched with especial care by the Romans, he discusses throughout in terms of Roman law.

He begins characteristically by discussing the law first from a theoretical point of view, in order to justify its claim to being a legal principle. He understands the word "kill" in the commandment throughout as meaning homicide, and says that it always deserves the death penalty for two reasons: first, because the killing of a man is a breach of the Law of Nature, which has made all men with the design that they live peaceably together;[76] and second, because the crime is a glaring instance of ἱεροσυλία, the more serious type of sacrilege whose punishment was always death under Greek law, and had formerly been so under Roman law.[77] He has rather a difficult task to justify his appeal to this law, for it applied strictly to desecrations of temples or statues of the gods. But Philo explains that man is a temple of the Spirit, and an image

[76] *Decal.*, 132.

[77] *Decal.*, 133 f.; *Spec. Legg.*, III, 83 ff. Cf. Lipsius, *Attisches Recht*, pp. 442 f.; Mommsen, *Strafrecht*, pp. 768 f. Little is known of ἱεροσυλία in the Greek law of Egypt except that it was regarded as a public crime. See Taubenschlag, *Strafrecht*, pp. 51 f. But it seems most likely that it was a capital crime in Alexandria as well as Athens.

of God, so that the murderer who attacks the body of man has actually desecrated both the temple and an image of God, and so has under the law of ἱεροσυλία made himself liable to capital punishment.[78] Philo obviously understood the law perfectly, and if he is using it figuratively his figure is quite accurate. It may be that this way of explaining the law was suggested to him as an inversion of the Roman law which originally treated sacrilege as a form of murder.[79]

Of course such reasoning had no practical legal value, and Philo himself had no serious intention of requiring that everyone who caused the death of another person be executed. For in another passage he makes a fourfold distinction in murders: first, φόνος ἑκούσιος, or intentional murder; second, φόνος ἀκούσιος, or unintentional murder; third, ἐπίθεσις, which seems to mean murderous assault which failed of its object;[80] and fourth, βούλευσις the planning or instigating of a murder which was actually to be carried out by some other person.[81] This classification is made up of terms familiar in Greek practice, but it is striking that in summing up the general principles of action in the Roman laws of murder Mommsen has used precisely the same heads and order of discussion as Philo.[82] The first point to be settled, Mommsen explains, has to do with *dolus*, that is whether the act were done with evil intent. But also, he continues, quoting

[78] See also *De Praem. et Poen.*, 123.

[79] Mommsen, *loc. cit.*

[80] Cf. *Spec. Legg.*, III, 86; *Confus. Ling.*, 160.

[81] *De Fuga et Invent.*, 53; cf. *Spec. Legg.*, *loc. cit.* It seems to me that this latter passage illuminates and makes real the fourfold division specifically formulated in the *De Fuga*, and accordingly I would keep it fourfold, and with it the reading τὸ βουλεύσεως, and not change to τε καὶ βουλεύσεως, as Wendland and Heinemann would like to do. See *Werke, ad loc.*

[82] *Strafrecht*, pp. 626 f.

much relevant material, attempted murder is to be treated as involving guilt of murder: "in lege Cornelia dolus pro facto accipitur";[83] and further there is no distinction between the man who actually kills and him who brings the death about.[84] I cannot think that this coincidence is without significance. Like the learned Mommsen Philo is summing up, in my opinion, the principles of Roman law of murder, the only law in his society which had any application to the crime. If now he tries to read these back into the Torah, by the method of inversion discussed in the Introductory Chapter, and succeeds in connecting the first three with biblical proof-texts, his starting point was obviously the Roman law and not the Torah, for the fourth division he cannot connect with the Bible at all!

In practical procedure the chief concern according to Philo was the determination of the intent which lay behind the act. In another passage he returns to the distinction between φόνος ἑκούσιος and φόνος ἀκούσιος, stating that the whole matter hinged upon the question whether or not the deed had been done ἐκ προνοίας (§ 128). On the basis of this criterion it is clear that the instigator of a murder is simply to be considered guilty of φόνος ἑκούσιος, and not treated as a special type of murderer in court procedure, however much he might theoretically be distinguished (§ 86).[85] For the premeditating murderer

[83] Paulus, *ap. Dig.*, XLVIII, viii, 7. See other material in Mommsen. Mangey was fully aware of the completely Roman character of this passage of Philo. See his note, *ad loc.*

[84] Ulpian, *ap. Dig.*, XLVIII, viii, 15; *nihil interest occidat aliquis an causam mortis praebeat.* This is a principle much older than Ulpian; see *ibid.*, IX, ii, 7, 6, and Mommsen, 627, n. 4. Heinemann, *ad loc.* (§ 86), points out that it was also a principle of Greek law, and quotes Andocides, I, 94: "He who plans a murder shall be punished in the same way as he who does it with his own hand." Cf. Talmud Kiddushim 42ᵇ and elsewhere: "One cannot be an agent in an illegal act." See article, "Abetment," *J.E.*, I, 54.

[85] This is one of the points which chiefly distinguishes Philo's law as

no hope of escape, if his deed were done deliberately, can possibly be allowed, for according to Philo he must die. Even the right of sanctuary, which is of great importance in Jewish legislation for homicide, he restricts entirely to φόνος ἀκούσιος, saying that if one guilty of premeditated murder should rush to the altar of the temple he is to be dragged forth and surrendered to justice, since God does not protect wickedness.[86] Philo quotes this law not just because it is in the Torah, but probably with his eye on the Roman attitude toward asylum, which was apparently to tolerate the institution, though with distinct restriction of abuses.[87]

But in spite of his theorizing as to the propriety of having the death penalty always follow murder, Philo is too well informed in law to demand such a penalty always, even in case of φόνος ἑκούσιος. So, without attempting any justification from the Torah for such a statement, he announces the following law:

> But some people slay with swords, spears, darts, clubs, stones, or any such instruments (Philo has this list from Numbers 35, 16-18, where all murderers using these weapons are *specifically to be executed*), and yet may possibly have committed the murder with no premeditation, and without having considered the act at length within themselves, but have acted under the impulse of the moment, excited by a passion stronger than their reason: their deed

being in this connection more like the Roman than the Greek. By Attic procedure βούλευσις was not regarded as φόνος ἑκούσιος, but as a parallel with φόνος ἀκούσιος, and so to be tried in the Palladium like φόνος ἀκούσιος, rather than in the Areopagus.

[86] §§ 88-91; cf. Exod. 21. 14. On sanctuary see above, pp. 41, 54 ff., and below, pp. 118 ff., and article, "Homicide," *J.E.*, VI, 452.

[87] The generally accepted view of Mommsen (*Strafrecht*, p. 460, n. 1) and Rostovtzeff (*Römisch. Kolonat.*, pp. 216 f.) that the right of asylum had practically been abolished by Augustus and Tiberius has recently been challenged by Woess, *Asylwesen*, pp. 211-221. His evidence is enough to throw doubt upon the earlier view, but not enough to make clear just what the Romans did with the eastern sanctuary right except considerably to restrict its use.

is thus only half as serious, since they did not set their minds long in advance toward the crime. (§ 92.)

This seems to me, since all the other parts of Philo's discussion of murder are so definitely under the influence of Roman ideas, to be most likely an adaptation of Jewish ideas to Roman practice again, even to the point of specifically saying that these crimes of murder are not always, as commanded in the Torah, to be followed by the death penalty. As a matter of fact, the mitigating circumstances which must have been taken into account in the setting of penalty by the Roman court in murder trials have not been preserved for us in any satisfactory form. Mommsen, when discussing this point, said that there must have been much more definite rules for procedure in such cases than he could anywhere discover.[88] I suspect then that this perfectly practicable principle for distinguishing premeditated from unpremeditated murder is itself an important indication of what the Roman courts were actually doing in such cases in Alexandria, though Philo gives no indication of what the penalty for "half-murder" would have been. Certainly the law has no relation to Jewish law, and was sufficiently important in Philo's mind to make him go out of the way to establish it in contradiction to the Bible.

Philo's dependence upon Roman law in discussing murder continues to be clear as he goes on to his next point, murder by poisoning. Poisoning is not mentioned specifically in the Torah, probably because, as Weyl suggests,[89] the use of poison was not a Jewish characteristic. Philo's remarks are so interesting as to warrant full quotation:

But there are other extremely depraved men, whose hands and minds are alike polluted, the sorcerers and poisoners. These devote

[88] *Strafrecht*, p. 626.

[89] *Die jüdischen Strafgesetze bei Flavius Josephus in ihrem Verhältnis zu Schrift und Halacha* (Berlin, 1900) (Diss.), p. 63.

their leisure and spare time to making opportune attacks, and devise manifold tricks and contrivances for bringing calamity upon their neighbors. Wherefore it is commanded (so he understands the Torah) that poisoners, whether male or female, are not to survive for a day, no, not for a single hour, but are to be killed immediately upon capture, for there is no reason for procrastinating and postponing their punishment. For a man can protect himself against open attack, but it is not easy to detect those who in secret devise and contrive their attacks with poisons. So, then, it is necessary that they should suffer what they proposed to inflict upon others. Furthermore, in contrast to the man who openly kills with a sword or some similar weapon, and who can slay only a few men at a time, he who mixes and combines deadly poisons with food does away with myriads of people who have not suspected the assault. So great crowds of banqueters have come together in good fellowship at the same salt and table only to suffer suddenly in the libation something which should have had no connection with it, and to receive death in the place of festivity. Wherefore it is right in dealing with such fellows that even the most equitable and moderate of men should kill them, for in doing so they do not become murderers, but only think that it is suitable that the penalty should be executed by themselves rather than by others. For surely it is a frightful thing to contrive death by means of food which was ordained to be a source of life, and so to transform that which is by nature nutritious as to make it the bearer of destruction, with the result that people, who go to their food and drink prompted by the necessities of nature, and who do not foresee the treachery, instead of what is beneficial take to themselves what will bring them utter calamity. And let those suffer the same penalty who do not mix deadly drugs, but who administer poisons that induce protracted illnesses. For death is often preferable to illness, especially to an illness which lasts a long time, and has a hopeless outcome. For the disorders that come from poisons are very hard to cure, if not completely incurable.[90]

With this law should be compared a similar one quoted by Josephus:

Let no one of the Israelites keep any deadly poison, or any other harmful drug, and if he be caught with such let him be put to

[90] §§ 93-98. Philo goes on a few sentences further to discuss the nature of these illnesses induced by poison.

death, himself suffering the fate which he had planned to inflict upon those for whom the poison had been prepared.[91]

It is interesting to find both these Jews forcing this law back into the implications of the Torah, for in spite of the fact that Philo explicitly suggests to his reader that the law as he gives it is to be found in the Bible, no trace of such a law is mentioned there. The only scriptural passage to which he can be understood as remotely referring is the general command, as it appears in the Septuagint, that *φαρμακοί* be not tolerated.[92] The word *φαρμακοί* means, of course, either sorcerers or poisoners, but is here a translation of the Hebrew word for sorcerers. The word is commonly used with that meaning in the Scripture, and since Philo goes on immediately after this passage to talk of sorcery itself, he is quite aware that such is its meaning here. The nature of the law itself as Philo and Josephus quote it suggests the reason why it is thus forced into his code.

For while Greek, Ptolemaic, and Roman laws alike treated poisoning as a special crime, parallel to, but not identical with, murder,[93] in two important points Philo and Josephus do not agree with Greek tradition, for both Jewish writers specify that all injurious drugs, and not only the deadly ones, fall under the same category, while Josephus adds the detail that the mere possession of such drugs is a capital crime. Both of these details go directly counter to the spirit of Greek and Ptolemaic legislation, which had grounds for action only in case of a fatality. But it is precisely these two points which distinguish Roman legislation on the subject from Greek, so that Weyl[94]

[91] *Antiq.*, IV, viii, 34 (279). [92] Exod. 22. 18; Deut. 18. 10.

[93] For Greek law of poisoning see Lipsius, *Attisches Recht*, p. 607. This separate treatment of poisoning was carried over into Ptolemaic law; see R. Taubenschlag, *Strafrecht*, p. 9.

[94] *Op. cit.*, pp. 65 ff.

was quite correct in saying that what lay behind their remarks was the Roman republican law, "Lex Cornelia de sicariis":

> Eiusdem legis Corneliae de sicariis et veneficis capite quinto, qui venenum necandi hominis causa fecerit, vel vendiderit, vel habuerit, plectitur. Eiusdem legis poena afficitur, qui in publicum mala medicamenta vendiderit, vel hominis necandi causa habuerit. Adiectio autem ista veneni mali, ostendit esse quaedam et non mala venena. Ergo nomen medium est, et tam id, quod ad sanandum, quam id, quod ad occidendum paratum est, continet, sed et id, quod amatorium appellatur.[95]

It is clear that this law was a common source for Philo's and Josephus' remarks, rather than that Josephus had the idea from Philo, for the later writer quotes details, obviously from Philo's source, but which the earlier writer did not himself bring in.

The explanation of this parallel with Roman law which Heinemann has offered I find it impossible to accept. He says that Philo and Josephus are here interested only in expounding the biblical φαρμακός, and have probably been influenced by Roman law in the course of the exposition.[96] In face of the complete orientation of the Jewish law of murder to Roman law which has been shown, even to the point of Philo's putting in new laws directly and avowedly contrary to the legislation of the Torah, as in the law of unpremeditated murder,[97] Heinemann seems to me quite wrong. Upon Jewish law there was obviously a great pressure to make itself conform to the practice of the Roman courts, especially in the cases where the Romans claimed complete jurisdiction. That such is the case here is made more clear from the form in

[95] *Dig.*, XLVIII, viii, 3.

[96] *Werke*, II, 213, n. 3: "Philo und Josephus wollen nur das biblische φαρμακός erläutern, sind aber wohl durch das römische Recht in ihren Ausführungen beeinflusst."

[97] See above, pp. 103 ff.

which it is quoted by Philo, for directly contrary to Roman practice he recommends that the punishment take the form of lynching. Court process is specifically ruled out, and lynching is called for imperiously. While the law itself then is Roman, the action he recommends is the only form of action which Jews could have taken in such a case under Roman rule. A clearer case could not be found of actual Jewish practice under the Romans. The Jews preferred taking a poisoner out and stoning him at once to turning him over to the Roman officers, yet the defense of their doing so was entirely in terms of the Roman law. And the fact that Josephus has fresh and primary reference to the same Roman law makes its living presence in Jewish practice indubitable.

So also a clearer case could not be found to illustrate what I mean by Philo's inverted or reversed manner of writing. Wishing to reconcile the conflict between his beloved Torah and the legal practices forced upon his group he begins, to all appearance, with texts of Jewish law from which he deduces the Roman law, as though the Roman law were implicit in the Jewish. But this method of writing is an inversion of his thought process, and must not confuse his reader today. His real starting point is the immutable fact of the practical law which his group has had to work out in its environment. To justify this practical law he adduces shreds of biblical phrases, which he represents as being his real point of departure, but which are actually only afterthoughts in his legal thinking.

Incidentally it should be noted that the few cases of poisoning of which we have still information from the Roman period in Egypt treat the crime as distinct from ordinary murder, but in a way which might be either Greek or Roman in inspiration.[98] Philo shows for the first

[98] Taubenschlag, *Strafrecht,* p. 80.

time that Roman ideas of the law of poisoning were definitely the basis for practice in Egypt thus early.

Magic itself, the other meaning of φαρμακεία, Philo commends as fittingly the sort of knowledge especially demanded of the greatest, that is the Persian, king.[99] But fake magicians, he says, and abusers of magic are, like poisoners and venomous snakes to be killed at sight, without giving them time to continue their machinations during a trial. Such a distinction, while not warranted by any statement in the Torah, was made by later rabbinical tradition, Heinemann points out at the passage, as it was made generally in the ancient world. But again it seems to me more than a coincidence that Philo thus connects his law, putting the death penalty upon bad magic, with the law of poisoning. For Mommsen has pointed out that at the time when Philo was a young man, that is early in the reign of Tiberius, the Roman Senate had decreed such a law against bad magicians as a derivative statute from the law against poisoners.[100] So Philo's law is much closer to the Roman than to any other of the ancient laws on the subject, and again it is important to notice that all that Jews can do in such a case is to lynch. Court process is strictly not provided for, so that the case is throughout similar to that of poisoners.

In Philo's general discussion of murder this section on the poisoners and magicians is something of a digression. He begins his next section (§§ 104 ff.) with a restatement that murder is not always premeditated, though he draws no further conclusions as to action in such a case. Rather

[99] §§ 100-103. Mangey notes *ad loc.* that the same point is made by Cicero, *De Divinat.*, I, xli, 90, 91: "Nec quisquam rex Persarum potest esse, qui non ante magorum disciplinam scientamque perceperit." Philo makes exactly the same statement, with the authority "they say," and may well be referring to this passage of Cicero.

[100] *Strafrecht*, p. 640, n. 7.

he goes on to raise the question of the treatment of a case where the death of the victim is not immediate after the murderous attack, but comes only after some time of illness. His judgment is that if the victim dies as a direct result of the attack, the murderer is to be held fully responsible, just as though the death had been instantaneous. But if there is a period during which the victim rallies and recovers somewhat, so as to be able to walk about, then, even though later he may suffer a relapse, and die, the attacker is not to be held guilty of murder, for other circumstances may have intervened to cause the death. Upon the victim's recovery to the extent of being able to walk the assailant is to pay a double damage, one to cover the victim's loss of work time, and one for the direct expenses of his illness, specifically for the doctor's fees. In this law Philo is following both Mosaic and Roman legislation, for both made the same provision that the damages in such a case were to cover both the loss of time and the cost of healing.[101] But in specifying that the doctor's fees be paid by the assailant, Philo seems definitely to echo the phraseology of the Roman law, which probably was current in Philo's day, though it is preserved to us only from Gaius' time. It is rare that Philo was happy enough to find such complete agreement between his two systems of law. But he particularly makes it clear that this law applies only in case of a dispute and the blow having been struck in sudden anger, without premeditation. For if the blow had been premeditated, the

[101] Exod. 21. 18, 19; Gaius *ap. Dig.*, IX, iii, 7. Mangey, *ad loc.*, points out this parallel (which Heinemann ignores), and indicates also that the same principle was used by the Romans to settle injuries in the cases *Pauperies*, *Dig.*, IX, i, 3. Gaius' law reads: "Quum liberi hominis corpus ex eo, quod deiectum effusumve quid erit, laesum fuerit, iudex computat mercedes medicis praestitas ceteraque impendia, quae in curatione facta sunt; praeterea operarum, quibus caruit, aut carituras est ob id, quod inutilis factus est."

case would fall under the law for deliberate attempt at murder, which was treated as completed murder by his law, as he had it from the Roman law.[102] I think accordingly that the penalty of death for which he calls if the victim died had no practical meaning. Philo has only quoted a little too much of the old Jewish law, which otherwise harmonized so beautifully with Roman law, for he has already altered a scriptural command to say that unpremeditated murder was only half as serious as deliberate murder.[103] At any rate this particular penalty would, unless it had Roman approval, or was carried out by lynching, have been impossible of execution.

Thus far Philo's law of murder has followed Roman law very closely. But he goes on to draw two corollaries from these principles which have no basis in Roman law at all, and are clearly Jewish.

The first corollary is that he classes as voluntary murder the striking of a pregnant woman in which miscarriage results with fatal effect for the baby.[104] This ruling of Philo's is based upon a passage in the Septuagint where the Greek mistranslates the Hebrew. For in the Septuagint the fatality for which action is to be taken is made to be that of the child, while the Hebrew plainly implies that its concern is for a fatality to the mother, not the child.[105] But Philo's law explains that such an act is murder, to be followed by the death penalty, only when the child which is born dead as a result of the blow is fully formed, for a child fully formed is a human being, who is only waiting the proper time to come forth from the workshop of Nature. But if the fetus is unformed, the punishment is to be a fine. This distinction is an unex-

[102] See above, p. 102. [103] See above, pp. 103 f.

[104] §§ 108, 109; Heinemann's notes *ad loc.* cover the ground excellently.

[105] Exod. 21. 22 ff.

pected one, for Philo shows in two passages that he quite agreed with the Stoic and rabbinical theory that the fetus is simply a part of the mother the entire time it remains in the womb,[106] and does not itself become a ζῶον until after it is born, on the basis of which theory the destruction of the fetus in any stage could not be treated as murder.[107] The Roman law for such cases was based upon this Stoic theory, and so did not treat them as murder at all,[108] so that Philo's distinction has no support in Greek or rabbinical philosophy or in Roman law, while it is by no means forced upon him by anything in the Septuagint. The obvious source for the distinction, then, since it is not in Philo's own thought, or in the Septuagint, or in Roman law, or in Greek law, is to be found, and only to be found, in the practice of the Jewish courts in Alexandria in such cases, courts which were doing business on the basis of the text of the Septuagint, but which were not, like Philo, acquainted with the Stoic and the Palestinian theory of the fetus, and so had come to make a theory of their own. Certainly if the Jewish judges were faced with the administration of such a law as the Septuagint gives, a limitation of its scope by some such distinction would inevitably have developed. Procedure in this case Philo does not, unfortunately, suggest. Neither is lynching called for, nor is a defense stated

[106] In Talmud Sanhedrin 80[b] the unborn child is considered as part of its mother, so killing it in its mother's womb is only a finable offense. (Article, "Homicide," *J.E.*, VI, 453.)

[107] § 117, and *De Virtut.* 138; see Heinemann's remarks, *Werke*, II, 217, n. 1. Heinemann points out the discrepancy, but does not attempt to explain it.

[108] Mommsen, *Strafrecht*, pp. 636 f. Similarly, in the instance recorded in *Pap. Rylands* 68 (II, 9, 10), 89 B.C., the concern seems to be solely for the assaulted woman, and no attention is paid to the fate of the child she was carrying. But since at the time the papyrus was written the child was still safe, no conclusion as to procedure if the woman had miscarried can be drawn.

which could be used in pleading at the Roman tribunal for ratification of the Jewish sentence. The case is one which would have been left by the Romans to the jurisdiction of the local court, since by their standards it involved only the crime of assault, so that in its treatment a living Jewish tradition would have been maintained. It is certain, however, that if the Jews wished to enforce this law they must either have taken it to the Roman governor for approval, or resorted to lynching. Probably the latter was the case, since the Jewish law was in such contradiction to the Roman law that formal defense of the Jewish sentence would have been most difficult. It is likely that Philo simply omits reference to lynching again, because he had so frequently already pointed it out as the treatment for murderers. That a person could be lynched following a Jewish trial, for an offense not recognized by Roman courts, is made clear by the case of Stephen.

But if the fetus destroyed by the assailant is not yet formed, the case is treated quite differently, as one of assault. The penalty now takes the form of a fine, as the Torah stipulates. But it is interesting that Philo says that the money paid in damages is paid for two reasons, one because of the ὕβρις itself which has been committed, and the other because the culprit has interfered with Nature in the work of making a human being. But these two reasons involve distinct principles of law, and distinct penalties. For the money from the first would naturally go to the plaintiff as reparation of her injury (or to the plaintiff as the woman's husband), while money on the second count would just as naturally go to the court and society as the guardian of Natural Law. So in spite of the fact that the scriptural penalty is a settlement of actual damages to the plaintiff, in which the court only arbitrates the

amount,[109] since Philo has thus gone out of his way to speak of the two grounds for a fine we should suspect that in Philo's court two such fines were paid, a suspicion which is made trebly strong by the fact that in speaking of the same crime Josephus provides that precisely such a double fine be paid, stipulating that one part is to go to the court, the other to the woman's husband.[110] Josephus suggests that the fine paid to the court was to indemnify society for the loss of one of its potential members, but the important point for our interest is that the double fine was called for, and in a way that lent itself to Philo's explanation as readily as to Josephus'. Behind Philo's apparently meaningless word play, then, there is demonstrably here a distinct purpose. The Jewish court he knew called for this double fine, apparently under the influence of Ptolemaic practice, though Philo is aware he has no justification for the double fine in Scripture. To make light of the discrepancy Philo has only hinted at the grounds for the practice he knew, without feeling any necessity for stating, in a treatise designed to show the high practical value of the Mosaic legislation, that the Jews did not follow it in this case.[111]

In spite of Philo's use of the term ὕβρις it seems clear that the change in Jewish procedure was inspired by the Ptolemaic procedure for βία. For while in actions it was often hard to distinguish cases of ὕβρις from those calling for treatment as βία, the chief difference in the procedure for the two was that one convicted of ὕβρις paid damages to the plaintiff, which might be, or usually were,

[109] Exod. 21. 22.

[110] *Antiq.*, IV, viii, 33 (§ 278); cf. Weyl, *Die jüdischen Strafgesetze bei Flavius Josephus*, pp. 57-62.

[111] Weyl, *loc. cit.*, suggests that Josephus' remarks resulted from the failure of Josephus to understand the biblical text. This seems quite unlikely. Weyl does not take into account the parallelism from Philo.

double the amount of injury, but the crime of *βία* carried with it a fine to the court in addition to the damages paid the plaintiff.[112] The Jewish process is thus identical with the Ptolemaic procedure for *βία*, in spite of the fact that Philo uses the term *ὕβρις* in connection with it. But his use of the term there is strictly correct, for he applies it only to the private aspect of the crime, which must have been complicated by the addition of public aspects to have made the deed as a whole *βία*. It is probably only a matter of chance that Philo does not use the latter term for the two aspects together.

Philo draws an interesting corollary from the law which describes the destruction of a fetus fully formed as murder, for he goes on to affirm that the killing or exposing of newborn children is also murder (§§ 118-119). This inference is to be found, so far as I could discover, only in the writings of Philo, for while the widely prevalent custom of infanticide was generally condemned by the Jews, their condemnation of it is by no other extant writer connected with a specific passage in the Mosaic Code.[113] Philo then proceeds to condemn infanticide as a perversion of Natural Law, as murder, as *μισανθρωπία*, *ἀνδροφονία*, and *τεκνοκτονία*, for the use of none of which terms had he technical justification from Roman jurisprudence. For the act tended later to be classed as murder by the jurists,[114] but in his own time it was not only permissible to discard undesired children, but by the Gnomon of the Idios Logos one risked a penalty in attempting to save a child which had been thus abandoned.[115] In this connection his treatment of the case of

[112] Taubenschlag, *Strafrecht*, pp. 17, 23 f., 86.

[113] For parallels of denunciation of this practice in Jewish and pagan literature see Heinemann's notes *ad loc.*

[114] See Mommsen, *Strafrecht*, p. 619.

[115] The literature on this is rapidly growing. See especially J. Carco-

the exposure of the infant Moses is interesting. He represents it as an act of necessity which put horror and despair into his parents' hearts, for they were good Jews, and did not, like οἱ πολλοί, consider that an infant which had not yet partaken of human food was not to be regarded as a human being.[116] So it is to contradict this notion that he quotes the Stoic view just alluded to, that the fetus becomes an independently existing human being immediately upon birth.[117] Philo's passage is beautifully eloquent, picturing the helpless infants being slain, or torn by beasts, and, far from regarding the killing of children as blameless, he thinks that their very innocence makes infanticide much worse than the killing of an adult. Again he does not specify the procedure, but it is clear that Philo would have cast the first stone at any Jew detected in such practice.

But while Philo thus condemns the exposing of children, and has rejected, for his law of attack upon a pregnant woman, the Stoic view that children are not to be regarded as human beings until birth, there seems to be a hint here in his manner of returning to the Stoic view that he did not legally condemn induced abortion. He

pino, "Le Droit Romain d'Exposition des Enfants du Gnomon de l'Idiologue," in *Mémoires de la Societè nationale des Antiquaires de France*, LXVII (1928), with excellent bibliography. See also Deissmann's, *Light from the Ancient East*, 1927, pp. 167 ff.; Weiss, "Kinderaussetzung" in Pauly-Wissowa, *Real. Encyc.*, XI, 463 ff., Taubenschlag in *Zeitschr. d. Savigny-Stift*, XLVI (Rom. Abt.), pp. 71 ff.; F. Maroi, "Intorno all' adozione degli esposti nell' Egitto romano," in *Raccolta di Scriti . . . G. Lumbroso* (Milan, 1925), pp. 377-406.

[116] *Vit. Mos.*, I, 11.

[117] § 117. Wendland, *Philo und die kynisch-stoisch Diatribe*, pp. 37 f., referred to by Heinemann, *ad loc.*, considers this whole attack upon the exposing of infants to have been inspired by the ideas expressed in the Cynic diatribes. This may have been true, but Wendland's parallel from Musonius is not in itself convincing, since the Jews were famous opponents of this aspect of Hellenistic civilization from the first. See Tarn, *Hellenistic Civilization*, p. 88.

implies a contrast, as a result of the Stoic theory, between killing a child which has been born, and killing one not yet born.

> Children who have been born are separated from that to which they had been grown fast, and when they have been delivered they become living beings in their own right, and lack nothing of what goes to make up human nature. Thus he is *indubitably* a murderer who kills a baby, for the Law's condemnation of the crime has reference not to the age of the victim, but to his membership in the human race.[118]

Only a person, accordingly, who has killed a child that is born is *indubitably* a murderer. The phraseology suggests that he knew of induced abortion as a solution of the problem of birth control, and that its legal guilt was an open question to him. Certainly he does not denounce it, as Josephus does later.[119] Knowing Philo as we do, it is impossible to think that he would not have bitterly opposed it on moral grounds, but that the practice was legally actionable in his courts seems questionable.

With this Philo has finished what he has to say of the various forms φόνος ἑκούσιος might take. He has definitely included under it all cases where death has resulted from a malicious attack of any kind, even cases where the fatal consequences went beyond the intention of the assailant, or where action of the assailant was entirely spontaneous. So he has left for φόνος ἀκούσιος only cases where one man kills another by pure inadvertence, without trace of hostile intent of any kind. Roman law also set no penalty upon purely accidental homicide,[120] so

[118] § 118: τὰ δ' ἀποκυηθέντα τῆς τε συμφυΐας ἀπέζευκται καὶ διυφειμένα καθ' αὑτὰ ζῷα γέγονεν οὐδενὸς ἐπιδεᾶ τῶν ὅσα συμπληρωτικὰ τῆς ἀνθρωπίνης φύσεώς ἐστιν, ὥστε ἀνενδοιάστως ἀνδροφόνον εἶναι τὸν βρέφος ἀναιροῦντα, τοῦ νόμου μὴ ἐπὶ ταῖς ἡλικίαις ἀλλ' ἐπὶ τῷ γένει παρασπονδουμένῳ δυσχεραίνοντος.

[119] *Cont. Ap.*, II, 24 (§ 202); cf. Weyl, *op. cit.*, pp. 50 ff.

[120] See Pfaff in Pauly-Wissowa, *Real Encyc.*, VIII, 2250. But the case was actionable for damage by civil suit.

Philo was free to speak of it as he would. Accordingly in exonerating the man who has slain another under such circumstances he uses the same argument as that found in Demosthenes' speech against Aristocrates, that such death is really to be considered as the result of an act of the gods.[121] For when one man kills another without the slightest hostile intent against him, and entirely by accident, Philo regards the slayer as having been used as an instrument by God for visiting divine wrath upon the victim, who must himself, instead of the apparent murderer, be regarded as for some reason offensive in God's sight (§§ 120-122). For with the Greeks, as still traditionally with us, any horrible and unforeseen event which could not be laid to human motives was described as an "act of God," and legal conclusions with them, as still with us, were based upon that hypothesis. If then a man has been the victim of unplanned misfortune, we must assume that for some reason God was sufficiently angry with him to wish to smite him, and that the slayer was the unwitting agent of God. As Philo puts it, "The law thinks fit to save the man who has unintentionally killed another, knowing that he had no guilty purpose, but that with his hand he was ministering to Dike, the ephor of human affairs."[122] Hence the protection of God, to which it is impious for a wicked murderer to appeal, is freely offered to the man who without guilty intent has killed another, Philo points out, in the provision made for suppliants in the cities of refuge (§§ 123-136). But here Philo has reference to no practical institution which we

[121] Demosthenes, XXIII, 53. See Lipsius, *Attisches Recht*, p. 610, and Vinogradoff, *Historical Jurisprudence*, II, 182.

[122] § 129, cf. § 136, where such homicides are described as having served *τοῖς τῆς φύσεως βουλήμασιν, τισαμένης διὰ τούτων τοὺς ἀναιρεθέντας, ὧν ἀφανῶς αὕτη δικάσασα παρ' ἑαυτῇ θάνατον κατέγνω.*

can recognize, and seems to have left the realm of practice altogether for exegetical moralizing.

For while he makes much of the cities of refuge provided in the Bible from an ethical point of view,[123] it is impossible that the biblical provision for such cities in Palestine could have been of the least use to Jews in Egypt, even if they were still in use in the mother country, since the value of a sanctuary depends entirely upon its accessibility. Philo distinctly repudiates the idea of refuge to the temple as sacrilegious, and describes the Jewish system of sanctuaries at special cities as inherently a better system, on the ground that no one should approach the temple altar without having been ceremonially purified,[124] yet he again quotes Exodus 21. 14 with approval, that the wicked murderer is to be dragged from the altar to die. This verse is probably given so much importance because it distinctly expresses the Roman compromise with the oriental and Greek law of asylum, that refuge to asylum was permitted, but only in cases where no injury was done thereby to someone else.[125] But one peers in vain behind these passages of Philo's to discover what was the Jewish system of asylum in Egypt. The Jews had gone far, it has appeared,[126] toward accepting the Ptolemaic system of asylum in its pagan form in having allowed their household hearths to be used as altars for the asylum of fugitive slaves. But it is incredible that they should have gone thus far for the benefit of slaves, yet made no provision for free Jews who, in a group where lynch law was so freely appealed to, must

[123] Philo frequently allegorizes the cities of refuge. See also *Spec. Legg.*, I, 158, and above, p. 41.

[124] See preceding note and §§ 88 f.

[125] Woess, *Asylwesen Ägyptens*, p. 207; *Dig.*, XLVII, x, 38; XLVIII, xix, 28, 7; Mommsen, *Strafrecht*, p. 460; Tacit., *Annal.*, III, 63; see above, p. 103.

[126] See above, pp. 53 ff.

have found sanctuaries an important part of their social system. Philo's attitude seems to me most probably explicable on the grounds that the Jews had no, or no important, sanctuaries of their own, and that hence the provisions of the Torah were so completely a dead letter in Egypt that the passages could only be used for moral allegory. A fugitive Jew would probably have clung to the first altar or statue of an emperor he could find, without regard to the theoretical significance of his act. But while this seems the conclusion from what Philo says, the fact remains that the single Jewish synagogue which has been excavated, that at Leontopolis, bore an inscription which said that a Ptolemy Eurgetes[127] had made it a sanctuary. It would be rash to conclude from this single instance that synagogues were often enough made into sanctuaries so that the Jews had an adequate system of asylums of their own in Egypt, and did not need to use the pagan sanctuaries. For if such were the case, it is curious that no hint of the fact appears in what Philo says about asylums. It seems to me that our very slight evidence does not even furnish grounds for a hypothesis on the subject.

Parenthetically, under his discussion of the cities of refuge, Philo seems to be defending the use of lynch law on the ground that lynching is justifiable homicide, from the precedent of the Levites who slew the worshipers of the golden calf. Philo himself does not explicitly make the inference, but it is clear from his glowing description what he had in mind. After depicting the Israelites setting up the golden calf he says:

[127] Woess, *Asylwesen*, pp. 9-11, argues again that Mommsen was right in assigning the inscription to Ptolemy VIII, though Wilcken had long held for Ptolemy III. See his *Grundz. u. Chrest.*, I, ii, 78, where the inscription and literature are cited. Schürer, *Gesch. d. jüd. Volkes*, III (4th ed.), 41, and Tarn, *Hellenistic Civil.*, p. 173, agree with Wilcken. I do not see that the evidence justifies a decision for either.

But the aforesaid tribe [the Levites] were consumed with passion at this sudden lapse in observances, and by reason of their nature that hated evil they were enflamed with excitement, and were all filled with wrath and raged with a divine indignation. So with one accord they took up arms, and turning indifferently to one group or another struck down these revellers who were doubly drunk with their impiety and wine, even beginning with their own closest relatives and friends, in the conviction that only love of God really made friendship and kinship. . . . This expedition was undertaken voluntarily and spontaneously for the sake of piety and holiness before the only true God. . . . Not every instance of killing a man involves guilt, but only killing which involves unrighteousness, while of the other sorts the killing of a man which has been prompted by an urge and passion for virtue may be praiseworthy, while unintentional killing brings at least no moral stigma. (§§ 126-128, much abridged.)

While of course there is no generalization from this description which points directly to lynch law, it is clear that the emotion underlying Philo's remarks indicates a belief that a crowd thus taking the part of God in bringing His vengeance upon malefactors is highly commendable. Philo does not go more deeply into the discussion of the subject probably because it was one on which the less that was said the better. In harmony with his position he had at least the Roman principle that killing was justifiable in defence of life or chastity,[128] and the Roman practice of winking at Jews' lynching of each other when no one important to the Romans was involved. But the passage represents the sort of excuse by which the Jews would have defended lynching to themselves rather than an argument they would have advanced before a Roman governor.

The next question proposed by Philo is whether or not a man who kills his own slave by an act of violence is guilty of murder (§§ 137-143). The slave who is worked

[128] Mommsen, *Strafrecht*, p. 620. See also the Greek conception of *φόνος δίκαιος*, in Lipsius, *Attisches Recht*, pp. 601, 614 f.

to death is not discussed at all. The basis of Philo's reasoning on this question is the Stoic theory that slaves are the natural equals of their masters who have been reduced to their condition of servitude only by chance. But divine law, he points out, which is, in Pythagorean terminology, a matter of perfect harmony, finds its norm in harmonizing itself not with Chance, but with Nature. It is by this law that the householder must rule his domain, else he, like the public ruler who is not in harmony with natural law, becomes a tyrant; in which case, Philo implies, he is to be treated as such. In governing his slaves, then, the householder must regard them as human beings, at least in their right to their lives, or he has violated a Law of Nature. Philo's argument is not easy to follow in the passage, but such seems to be the reasoning behind what he says. Heinemann[129] has pointed out the generally Stoic character of this argument, but has missed the most striking parallel in Seneca's *De Clementia*, I, 18. There Seneca urges the kindly treatment of slaves, and says that owners should be guided by what is permissible according to *aequi bonique natura*, not by greed or passion. The reason such a criterion is assigned is that *commune ius animantium* sets limits upon what can be done to human beings, which includes all slaves, but particularly people who have been born free, and reduced to slavery by circumstances.[130] And Seneca, like Philo, compares the harsh householder to the civil tyrant. Philo's argument and Seneca's are thus far identical, but Seneca goes on to say that in spite of his ideal there are no legal restrictions

[129] *Ad loc.*

[130] Cf. Seneca, *Epist.* xlvii, *passim*, especially § 1: *"Servi sunt," immo homines. "Servi sunt," immo contubernales. "Servi sunt," immo humiles amici.* Cicero also demands strongly that slaves be treated with justice, though he has in mind specifically that they ought to be paid for their labor like free men, rather than their rights in general: *De Officiis*, I, xiii, 41.

upon what a master may do to his own slave, and illustrates by a famous case where a Roman slave owner used distasteful slaves to fatten his lampreys. This was written probably at just about the time when Claudius made a beginning in stopping such practices by decreeing that an owner who killed a slave because he was ill or disabled should be held for murder,[131] but such a conception of the right of the slave to his life did not become an active part of Roman law until much later.[132] Heinemann and Lipsius say that similarly no law protecting the slave's life from attack of his own master was known to the Greeks, but there is reason to doubt their conclusion. From several sources it seems likely that Greek law did protect, even from his master, the life of the slave.[133] So it was probably under influence from practical Greek usage that Philo, in Stoic language to appeal to Roman jurists, gives a detailed law defining exactly the criminal character of a master's killing his slave. When a slave has been killed, Philo explains, the master who killed him is to be taken to court and given a most searching trial to discover whether his

[131] Suetonius, *Claudius*, 25.

[132] Mommsen, *Strafrecht*, pp. 616 f., Roby, *Roman Private Law*, I, 53.

[133] The most striking passage is Euripides, *Hecuba*, 291f.:

νόμος δ'ἐν ὑμῖν τοῖς τ'ἐλευθέροις ἴσος
καὶ τοῖσι δούλοις αἵματος κεῖται πέρι

The Schol. to Aeschines, II, 87 describes the court of the Palladion where cases of *φόνος ἀκούσιος* and *βούλευσις* were tried, cases in which someone had killed *οἰκέτην ἢ μέτοικον ἢ ξένον*. See also Isocrates, *Orat.*, XVIII, 52; L. Farnell, *Higher Aspects of Greek Religion*, p. 54. The passage in Lipsius is in *Attisches Recht*, p. 794; Heinemann, *ad loc.* Lipsius and Heinemann base their conclusions upon Plato (*Laws* 865*d*, 868*a*) where penalty is set for killing another's slave, but only ceremonial purification for killing one's own. But even in killing another man's slave Plato calls only for a civil suit for damages. This conflicts directly with the provision at the Palladion for criminal action in such a case, and in view of the conflict it would seem that the passages quoted, none of which either Lipsius or Heinemann considers, should be given more weight than Plato's idealistic legislation. It certainly can be no coincidence that Philo discusses the murder of an *οἰκέτης* under *φόνος ἀκούσιος*.

intention had been murderous or not. If it is clear that the owner intended to kill the slave the owner is to die. Apparently Philo has in mind in what he is saying the commonest manner of killing slaves, beating them to death. For he goes on to say that in case the slave lives one or two days after the flogging the master is no longer to be considered guilty of murder, for if he had really intended to kill the slave he would have had the punishment go on until the slave actually died, or would have renewed it when he saw the slave reviving. If a servant does anything worthy of death he is not to be killed by the master, but brought to a regular court for punishment.

This is one of the most interesting passages in Philo's discussion of the law. With an inspiration that could have come only from Greek practice, a law, which was generally a dead letter among Jews everywhere,[134] appears here expanded into workable form according to the Graeco-Roman criterion that only intent made an act of killing into murder. The passage in the Torah upon which the law is based reads: "If a man smite his servant or his maid with a rod, and he die under his hand, δίκῃ ἐκδικηθήτω. But if he live on a day or two, he shall not be condemned; for he is his money."[135] The servant here referred to is in the Hebrew distinctly a bond servant, not a slave, which the Septuagint suggests by using παῖς instead of δοῦλος. What the penalty is to be is not specified, though one would infer that it was the death penalty; but most important is the fact that there is no suggestion of a trial for the master, or any question of his motive. If the master were only correcting the servant in the ordinary way, and he died of heart failure under a punishment which nor-

[134] Heinemann, *ad loc.;* J. Winter, *Stellung der Sklaven bei den Juden in rechtlicher und gesellschaftlicher Beziehung nach talmudischen Quellen* (Breslau, 1886), pp. 15 ff.

[135] Exod. 21. 20, 21.

mally would not have been fatal at all, the master would be as liable by the old law as though he had deliberately intended to continue the beating until the servant died. In Philo's statement the servants are called οἰκέται, though he clearly means slaves in the full sense from what he says in defense of their sharing in human nature, and the penalty for killing one is specifically to be death. In this the old law is made more strict. Yet in its mitigation Philo insists upon a trial to seek the motive, and it is obvious that in the trial the presumption would be throughout strongly in the owner's favor. For he expands the phrase "he is his money," as follows: "Furthermore, no one would be so silly as to bring distress upon another by which he himself will suffer disadvantage. But anyone who kills his slave brings a greater injury upon himself, for he loses the services he had while the slave was alive, and forfeits his monetary value, which was perhaps high." It is perfectly obvious where Philo's own sympathy would have been had he been judging such a case. In spite of the fact that he quotes the Stoic position to defend a Jewish law which, as he states it, is workable, but in penalty and application to ordinary slaves is even stricter than the Torah, his feeling is not in the least with the slave, but with the master. In view of the fact that Philo ordinarily ignores biblical legislation which is not to his taste, his passage here seems explicable on only one ground, namely that in Alexandrian Jewry there was a serious attempt to enforce the law as he describes it, so that as a legist he states and theoretically defends this genuine part of the code of his group, although as a man of great wealth and a large slave owner himself he would certainly have sympathized with the defendant in any such actual trial. Since the deed was not criminal by Roman standards, it would not have been heard by Roman

courts, and the Jewish law might thus have been a living tradition.

Philo's next problem under murder without intent is the discussion of the case where a man is killed by a beast owned by another man (§§ 144-145). Here again Philo presents a biblical law which has been worked into shape to conform with general Alexandrian practice. The Torah prescribes[136] that in case a ferocious bull kill a man, the bull shall be stoned, and no further penalty is to follow if the owner were not aware that the animal was dangerous. But if the owner, in spite of previous warning, has not kept a dangerous animal shut up, then the owner may be killed as well as the bull, or the relatives may ask for money damages instead of demanding the life of the owner, in which case he should pay.[137] If the person killed is a slave the ox shall be stoned and the owner be liable to pay the slave's master thirty didrachmas (thirty shekels) in damages. To make these provisions workable several changes were made. In place of the relatives of the deceased having the right to decide whether the beast's owner was to pay them damages or be executed, Philo specifies that the case is to go to court where it is for the judge[138] to decide whether the case called for a fine or a capital penalty, and I suspect that the court would have always called for a fine unless there were distinct proof of murderous intent on the owner's part. Further the amount of fine is to be decided by the court, not, as is implied in the biblical provision, by the relatives. In case of slaves Philo omits the set figure of the Bible, and says simply that the defendant is to pay the value of the slave. Thus changed the law would be

[136] Exod. 21. 28-32.
[137] See Holzinger's note to the passage in Exodus.
[138] Presumably the *ἀγρονόμος*; see below, pp. 159 ff.

workable in any civilized society. It was in perfect conformity with the Roman law for such cases as stated by the jurists of two centuries later as well as with the rabbinic law.[139]

Similarly in Philo's version the scriptural law is revised for cases where a bull has killed an animal belonging to another man (§ 146). In the Torah[140] it is provided that the live bull which has attacked and killed another bull be sold, and its price divided between the two parties, while the carcass of the dead animal is likewise to be divided between them. But if the owner of the aggressive animal knew that his beast was dangerous then the two are to exchange animals, the owner of the animal that was killed taking the survivor in its place, the other taking what consolation he can find from the carcass that is left. Josephus, as we now have his text,[141] simply reproduces the first part of the law, that applying to the case where the man did not know his animal was dangerous. But Philo's law reads: "If the bull has gored not a man but an animal the owner of the one which did the killing may keep the carcass, but shall pay damages in full equivalent, being thankful that although it was he who took the initiative in the injury, he is not obliged to suffer a heavier penalty." Here is a generally workable provision which avoids the obvious deficiencies of the biblical treatment. For in case the animal killed was peaceable and valuable, it would have been poor consolation to the owner for his loss to receive by scriptural law a dangerous and perhaps inferior beast in its place.

[139] Mommsen, *Strafrecht*, p. 836; *Dig.*, XXI, i, 40-42, and article, "Goring Ox," *J.E.*, VI, 49 ff.

[140] Exod. 21. 35, 36.

[141] Weyl, *Jüdische Strafgesetze*, p. 142, thinks the text was abbreviated by copyists; but if so it is probable that the copyist only omitted familiar, and hence not much altered, quotations from the Torah.

Philo's remark that the penalty of simple damages is a light one in view of the fact that the offending animal was the aggressor seems to come from a comparison in his mind with Roman and Greek law. In Roman law the first inquiry in case one animal killed another was as to which animal was the aggressor, and then the owner of that animal was held for simple damages if his beast survived while the animal attacked was killed, though the owner might settle, as in Jewish Torah, by surrendering the obnoxious bull.[142] But though the concern for the aggressive animal is similar to Roman law, the feeling that simple damages are insufficient, or very lenient, seems to refer to the Greek practice, which would normally class such cases under actions for βλάβη, which carried a penalty double the amount of injury if the injury were done voluntarily or by one who knew what he was doing, but only to the amount of the injury if the act were done involuntarily, or in complete ignorance of its possibly overt consequences.[143] But since, once the scriptural process had been clarified and simplified into the form in which Philo gives it, it was a perfectly practicable law under either Greek or Roman standards, the Jewish tradition in Alexandria had made no further move toward adaptation, though had Philo been himself writing the law, he would have made it carry a heavier penalty than simple damages.

Manslaughter which has resulted from carelessness is further discussed in the case of the man who has left an open pit unprotected, with the result that some person or

[142] *Dig.*, IX, i, 1, introduction, and § 11. The law goes back to the Twelve Tables. We need not be concerned for our purpose with the recent controversy over this law between Biondi and Lenel.

[143] Demosth., *Adv. Meid.*, 43; Aristotle, *Nicom. Eth.*, III, p. 1111*a* 22. See Lipsius, *Attisches Recht*, p. 654, Vinogradoff, *Historical Jurisprudence*, II, 194 f.

animal has fallen in and been killed (§§ 147, 148). The damage done to an animal is provided for in the Torah, in its law that the man who has left the pit unprotected is to pay the owner of the animal the amount of his loss, but may himself keep the dead beast.[144] Philo keeps this law, but adds to it two corollaries. The first is the case where not a beast but a man is killed by falling into the pit. The Torah makes no provision for such a case, but the Jewish courts at Alexandria had provided for it under the inspiration of Greek law. Initiative in bringing action is left to the relatives, as the Greeks would have done, and once the case is before the court it is for the court to decide whether the penalty shall be a physical punishment or a fine. Philo does not state the criterion which the court would use for deciding which form the penalty should take, but it is obvious that he means that the suit should be judged to fall under penal law if it proved to be a matter of criminal negligence.[145] In the same way is to be treated the man whose flat roof has no guard rail, and from which someone consequently falls and is killed. The Bible[146] mentions such a case, but makes no provision for action or penalty. Josephus, like Philo, connects this law of the roof with the law of the pit, and makes his statement conform to the Scripture in providing for action in case an animal has been killed in the pit, but interprets the law as merely advisory in relation to persons.[147] Halachic tradition specifically says that the process cannot be extended to apply to human beings at all, since but one of the two passages provides for action, and that only in the case of animals.[148] This is an excel-

[144] Exod. 21. 33, 34.

[145] For the conspicuous position of relatives in actions for *φόνος ἀκούσιος* in Attic law see Lipsius, p. 610, n. 39.

[146] Deut. 22. 8. [147] *Antiq.*, IV, viii, 37 (§ 284).

[148] Weyl, *Jüdische Strafgesetze*, p. 139, n. 6.

lent instance of exegetical Halacha which has no sense of practical jurisprudence, as contrasted with Philo's clear background of actual court procedure.

Philo introduces, as the last derivative law from the command against killing, a law which he puts here only because he has nowhere else to put it, namely the scriptural prescription that if a woman, to save her husband in a fight, seizes the genitals of her husband's opponent, her hand is to be cut off.[149] Philo's discussion of this law seems an excellent illustration of his elaborately defending a biblical law which he wishes to apply, but which he is aware is an anomaly in Alexandrine society. He begins with a description of the ideal life of woman, distinguishing between *πολιτεία*, the public state which is the concern of men, and *οἰκονομία*, the private household state where woman is supreme. Women are to remain properly within doors, virgins hidden away in the inner rooms of the houses, and women keeping themselves behind the outer doors. Only when they must go to the temple, by which he probably means the synagogue, shall they be allowed on the street, and then not when the streets are crowded, but at odd times when they can go as much as possible unobserved. Philo's discussion of the sphere and ideal conduct of women is to be compared with a similar discussion by the Pythagorean female philosopher Phintys. In praising the chief virtue of women as *σωφροσύνη* she points out that loyalty to her husband is the chief duty of a woman. Virtues of mind and body she should have like a man, but while there is much virtue that should be shared alike by both sexes, man's

[149] §§ 169-180; cf. Deut. 25. 11, 12. While this section seems genuinely Philonic, it is certainly misplaced, for it comes as an abrupt interruption of Philo's discussion of penology. Hence it is here treated slightly out of its order.

peculiar virtue is to be brave in war and to carry on public affairs, woman's is to remain within doors and to await and cherish her husband. So while she is to be faithful to him, not connect herself with orgiastic mysteries, and be modest in her personal adornments, Phintys says also that she is to be sharply restricted in going out of doors. She may attend the public sacrfices to the patron god of the city in the interest of herself, her husband, and her household; but she is to leave the house, not after dark or in the evening, but only when the market place is full and she is attended by one or, better, two companions holding her hand. Such excursions are also allowed for the sake of paying a call, or for the household shopping.

If it were not for the fact that Phintys thinks a woman's modesty is best protected in a crowd, while Philo prefers the less congested times of day, one would feel that these two disquisitions may well have had some close, if not immediate, connection. Even so I am forced to conclude that Philo must have had a treatise similar to that of Phintys on womanly modesty before him which he followed so closely that he inadvertently transposed a reference to the temple without recognizing its incongruity in his own text. He must certainly have been thinking of the synagogue as he wrote, but his actual words show that he just tore a page from some pagan writer.[150]

Philo applies this philosophy of the woman's sphere to the legal problem at hand by going on to say that to protect her privacy she is not even called upon for military

[150] For Phintys see Stobaeus, *Floril.*, LXXIV, 61 f., ed. Meineke, III, 63 ff., especially p. 65, lines 17 ff. See also Nicostratus, *ibid.*, §§ 62 ff. Stobaeus (§ 12) also gives a fragment from Euripides, *Meleagrus* (Frag. 525, Nauck):

ἔνδον μένουσαν τὴν γυναῖκ' εἶναι χρεὼν
ἐσθλήν, θύρασι δ' ἀξίαν τοῦ μηδενός.

For the reflection of this attitude toward women in Alexandrian law see Mitteis-Wilcken, *Grundz. u. Chrest.*, II, i, 211.

service. How terrible then when a woman rushes from her house to engage in street brawls! Even when she sees her husband in danger and is driven by her love of him to help him, she must never for a moment forget her modesty. And the very extreme to which immodesty could lead her would be for her to seize the genitals of her husband's opponent. Such an action, he says, is ὕβρις, is indeed the very superlative of θράσος. The use of these terms in this passage is interesting, and will be discussed more fully later.[151] On the basis of this prelude, then, Philo calls for the biblical penalty that the woman's hand be cut off, so that she will never be able to repeat such a crime, and be always thereafter a warning to other women by her mutilation. But still Philo is not content that he has made adequate defense of the law. Women are kept from gymnastic games, he argues, to protect their modesty from the sight of naked men; how much more should they be forbidden to touch what they are not allowed to see! Still unsatisfied with his defense, he goes on into one of the rare bits of allegory to be found in the *De Specialibus Legibus*, in which he describes this law as teaching a valuable distinction between souls which live in devotion to God, and those which are dependent upon creative things, and which reach forward to hamper the souls of higher type. So the cutting off of the woman's hand represents the elimination of one's lower nature. Philo is plainly working hard to defend the law. Why, if he thinks it needs so much defense, does he not simply omit it from his discussion, or alter it, as he has so frequently done already? The reason is obvious. The law was a familiar bit of peculiar Jewish law which the courts were still actively enforcing, but which, perhaps by some recent famous case, came in for considerable gentile criticism.

[151] See below, p. 240.

Philo's labored apology, if our method of discovering his "method" is correct, indicates a clash between the actual facts of Jewish practice, and the standards about him which he wishes to square with that practice. And since there is no parallel in Greek or Roman law to which he could appeal, his argument finally vaporizes into pure allegory. But the very pressure which thus forces him to extremes must be the pressure of actual facts to which he is trying by all means to adapt himself.

In a section interrupted by this passage on the immodest woman Philo continues his discussion of the crime of murder by considering the basic law of penalty for murder in the Torah, the *Lex Talionis* (§§ 150-168, 181-204). In the course of this discussion he is able to bring in much incidental legislation, but the interest throughout the passage turns upon the problem of penology.

Philo begins with the old law that no money is to be taken in lieu of execution from a murderer who has deserved the death penalty, or from a fugitive at a city of refuge to shorten his time of staying, for the blood they have spilled has polluted the land where the Israelites dwell, and only by the penalties assigned can the land be absolved.[152] Philo's rendering is that since blood alone atones for blood, the law prohibits in the case of a murderer worthy of death that he escape the penalty either by paying a fine or by exile (§ 150). That is, the law is generalized from its Palestinian provincialism, and expanded specifically also to exclude the familiar Greek alternative to the death penalty, exile. Similarly he goes on to say that in view of the fact that murderers merit ten thousand penalties, only one of which can be applied to them while they are alive, namely execution, so the Legislator (Moses) commanded that after the execution

[152] Num. 35. 31-34.

the body should be hanged up where all the universe could observe it, though to escape pollution it should be cut down before sunset and buried (§ 151). This again is an expansion of the original law. The Torah says only that if, after execution, a criminal is so hanged, he is to be buried before sundown.[153] The rabbis made this obligatory after a man had been stoned, but usually only in cases of profanity or idol-worship.[154] Philo's tradition makes it obligatory only, as far as we know, in case of murder. Again it seems to me that this is not the sort of expansion Philo would have done on his own speculative interest, but is a reflection of the practice of his group.

The subject of penology leads Philo also to comment with approval upon the biblical command that only the person who has committed a crime be involved in the penalty.[155] This law he insists is to be taken literally in its prohibition of substitutions in punishment, as when a father wishes to take the place of his son, or a son the place of his father, or, he goes on to infer, as when in greed tax-collectors torture whole families to get their levies. Philo tells a harrowing story, as an example of this last sort of offense, of a tax-collector who shortly before Philo's writing had forced the payment of taxes by whipping, torturing, and even killing, the heirs and relatives of some men who had fled because they were too poor to pay the tax assigned.[156] It is interesting that Philo approves the principle that a tax-collector may seize the persons of those who refuse to pay their taxes, though this

[153] Deut. 21. 22-23. [154] Heinemann, *ad loc.*

[155] §§ 153-163; cf. Deut. 24. 16.

[156] On this passage (cf. *Spec. Legg.*, II, 92 ff.), which clearly refers to some famous case, one in which Jews were probably involved, see Rostovtzeff, *Studien zur Geschichte des römischen Kolonates*, 1910, pp. 185, 206. The problem for Romans of what to do with people who thus fled from paying taxes, and who were guilty of ἀναχώρησις, as it was called, was perplexing. See Cornell Pap., 24.

was, as will shortly appear,[157] contrary to the best Egyptian and Ptolemaic tradition. His only objection in this case is that lacking the guilty parties the tax-collector had seized their innocent relatives. On the basis of the same legal principle Philo prohibits collective punishment, as, in case of treachery, the execution not only of the traitor, but of all his children with him, and, in the case of tyranny, the destruction of the tyrant's five most nearly related families with him (§ 164). The latter law has been identified by Heinemann at the passage as an old Macedonian law against tyranny which had probably been retained in Ptolemaic law, so that I should guess that Philo has in mind the custom of punishment in vogue among his neighbors in both cases. And he goes on to say that while it was only with reference to the death penalty that the Torah restricted punishment to the individual who was personally guilty, the intended implication was that the same limitation was to be applied to all penalties, fines, stripes, flogging, wounds, mutilation, ἀτιμία, exile, or any other (§ 168). Again Philo is so positive about his position that I suspect that the practice of substitutionary and collective penalties was common in Egypt at the time.

Having thus disposed of the death penalty and its imposition, with the inferences as to the persons upon whom penalty should be visited in general, Philo proceeds to discuss the theory upon which other penalties should be assigned. His basis for this discussion is the *Lex Talionis*, in connection with which he says:

> It is right to reproach those who impose penalties which are not equivalents of the offences, such as a penalty in goods for assault (αἴκεια), or public stigma (ἀτιμία) for wounding or mutilating some one, or banishment from the country and perpetual exile for de-

[157] See below, p. 139.

liberate murder, or imprisonment for theft. For any element of inconsistency or inequality is opposed to the constitution which has truth for its ideal. But our law, which is the exponent of equality, commands that those who do wrong shall suffer in the same way as those whom they have injured. That is, if they have done wrong in respect to the property of their neighbors they must be punished in property; if they have committed offence against a neighbor's body, in any of its parts, sections, or sensory organs, they must be punished in body; but if they have gone so far as to plot against life, the law commands that they shall be punished with their lives. For it would mean not the confirmation, but the destruction, of law if one thing which has nothing in common with another thing, but belongs to a remote category, should suffer for that other thing. And this we say when there are no complicating circumstances:[158] for it is not the same thing at all to inflict blows upon an ordinary person as upon one's father; nor to revile a public officer and a private citizen; nor to do a forbidden thing upon profane ground as to do it on sacred ground; nor to offend during a festival or a religious assembly or a public sacrifice, as on a day when none of these holiday provisions applies, or on a quite ordinary day. All such matters must be taken into consideration in augmenting or diminishing the punishment. (§§ 181-183.)

Greek law recognized the distinction between penalty suffered in the body, and a penalty paid in fine,[159] but used the distinction only to forbid the application of both in combination for a single sentence,[160] calling usually for the penalty of fines for a free man, and some corporal punishment for slaves.[161] So Greek law furnished Philo with the terminology which made possible the development of the *Lex Talionis*, but the development itself was made ostensibly on the basis of the old Jewish law, and in direct contradiction to Greek practices. For the penalties which Philo lists as quite erroneous according to Jewish

[158] Literally, "When other things are similar," *τῶν ἄλλων ὁμοίως ἐχόντων.*
[159] Lipsius, *Attisches Recht*, pp. 252, 931.
[160] Demosth., *Adv. Leptin.*, 155.
[161] *Ibid.*, *Adv. Androtion*, 55; from Vinogradoff, *Historical Jurisprudence*, II, 191.

standards are all recognizably Greek. The first crime he lists, that of αἶκεια, was in Athens punished by a fine.[162] The second crime in Philo's list is τραύματα καὶ πηρώσεις, the couplet listed by Plato as the name of a crime, murderous assault, second only to murder, and to be treated by the same criteria.[163] Lipsius discusses it under the caption τραῦμα ἐκ προνοίας, since, when the crime did not involve murderous intent, it would have been classed as αἶκεια or ὕβρις.[164] But from Plato's passage it appears that the word τραύματα was itself sufficient indication of the specific crime. Philo represents Greek law perfectly in saying that the penalty assigned was ἀτιμία.[165] There is no record of the Graeco-Egyptian treatment of the crime. Philo's third crime is the next and most serious of assaults in Greek law, that of intentional murder. Here again the punishing of murder by banishment which he deplores was a regular part of Attic law. Perhaps it would be more accurate to say that in cases of deliberate murder the murderer could save himself by keeping out of Athens; but since as long as he did so he had stated legal protection from pursuit,[166] Philo is right, if he has Attic law in mind, in saying that that law regarded exile as an adequate satisfaction for murder. Philo's fourth crime, theft, similarly was punished ordinarily in Greek law by payment of damages, as will shortly be seen,[167] but in some cases a prison sentence went with the fine.[168] There can be no doubt then that in his criticism of penalties which seem to him based upon the wrong principle he has Greek

[162] Lipsius, *Attisches Recht*, p. 646; Thalheim, *ap.* Pauly-Wissowa, *Real Encyc.*, I, 1006 f. See below, pp. 233 ff.

[163] *Laws*, 874*e*.

[164] *Attisches Recht*, pp. 605-607.

[165] *Ibid.*

[166] Vinogradoff, *Historical Jurisprudence*, II, 180.

[167] See below, pp. 146 ff.

[168] Lipsius, *Attisches Recht*, p. 440, n. 79; Vinogradoff, II, 176.

law in mind. Unfortunately we are not in a position to say that the Greek law of which he was thinking was its Ptolemaic version; but I strongly suspect that, if subsequent discoveries from papyri disclose how these crimes were treated in greater fulness in Greek Egypt, Philo will be found to have been thinking of the Greek law of his environment.

Similarly when Philo speaks of how circumstances complicate a crime he continues to have Greek law in mind. One of his contrasts, that between ordinary assault and striking one's father, may be a reference to Roman law,[169] though it was as true of both Greek[170] and Jewish laws as of Roman. But the distinction between attacking or reviling a private citizen as contrasted with the same conduct toward a public officer, while it was unknown in Jewish law, was made very sharply in Alexandrine law, following classic Greek law,[171] and of course in Roman law an attack against a magistrate was treated as *maiestas*.[172] It was a principle of law which the Jews must long have had to observe. And Philo's statement that a crime is complicated by having been done on a sacred day, or at a sacred place, seems again a reference unmistakably to the law of his environment, which must have taken from Greek law this fundamental principle

[169] See above, pp. 69 f.

[170] E.g., see Demosth., *Adv. Midiam*, 31-33.

[171] Pap. Hal., I, line 207; see also the notes in Graeca Halensis, *Dikaiomata*, pp. 78, 79; Arist., *Eth. Nich.*, V, 1132*b*, 29. The Athenian law penalized attacking a public officer with ἀτιμία, the Alexandrian law with triple the ordinary fine which would be imposed for a similar offense against a private citizen. As Heinemann here points out, in another passage Philo sets no special penalty for slandering magistrates: *Quaest. in Exod.*, II, 6. But it must be remembered that Philo is in that treatise only giving a running commentary upon Scripture, and making no attempt at squaring scriptural laws with practical law. That is precisely the distinction between his method and purpose in the two documents.

[172] Quintillian, V, x, 39: "Iniuriam fecisti, sed quia magistratui, maiestatis actio est," Mommsen, *Strafrecht*, p. 582, n. 4.

of its law of sacrilege.[173] Jewish law had no such provision in the Torah.

Over against these regular customs of his neighbors, then, Philo is contending that a much better basic principle of penology than any they follow is to be found in a true appreciation of the Jewish *Lex Talionis*. Philo does not literally demand a tooth for a tooth, for he was quite aware that in its primitive form the law was impossible, but he does think that a penalty in property should if possible be assigned for a property damage, and a corporeal penalty of some kind for physical injury. At the same time by his remarks about complicating circumstances he shows that he is fully sensible that such a principle in penology is by no means in itself sufficient. In many cases it simply will not work. But as a general ideal it is, he thinks, very suggestive. It is possible that besides the inspiration he shows himself to have drawn from the common Pythagorean ideal of statecraft, ἰσότης, he may also have had in mind the ancient Egyptian law, which, persisting in Ptolemaic and even in Roman law for Egypt, demanded that a defaulting debtor be not punished in σῶμα by being sold into slavery for his debt.[174] But still, even if the passage is only a bit of musing on the philosophy of law and penalty, as it would appear to be from the fact that Philo's penology in general shows no attempt at following the principle he here lays down, it is the musing, not of a speculative philosopher, but of a thoughtful lawyer, whose thoughts are throughout oc-

[173] Lipsius, *op. cit.*, 442 ff.; Demosth., *Adv. Midiam*, 33.

[174] Diodor. Sic., I, lxxix, 4; xciv, 5; see Vinogradoff, *op. cit.*, II, 245. The law was reaffirmed 68 A.D. by decree of Tiberius Julius Alexander, Roman prefect in Egypt, in the name of the Emperor. Dittenberger, *Orientis gr. insc.* No. 669, ii, 2; II, 393; Mitteis, *Reichsrecht und Volksrecht*, pp. 55, 445-449. On σῶμα in Greek law see Egon Weiss, *Griechisches Privatrecht*, 1923, pp. 138 ff.

cupied not so much with theories as with the actual penalties assigned in his environment. After all, all that Philo says is quite reasonable, and might serve as an excellent principle for a judge to bear in mind in assigning penalties, if, like Philo, he constantly reminded himself that it would not always work.

Incidentally it may be noted that in his remarks on this passage Heinemann says that Philo shows himself to have been ignorant of Jewish law by attempting to retain the *Lex Talionis* as a legal principle, since the earliest rabbinical Halacha seem to have abandoned it.[175] As usual in such a statement Heinemann is not allowing for any independent Jewish tradition in Egypt, but accepts or rejects statements of Philo as practical law according as they agree or disagree with the later non-Egyptian rabbinical laws. It is just as unwarranted to put Philo down at once as a legal ignoramus because he thus muses that ideal penalties would follow a sort of *Lex Talionis*, as to conclude that Cicero knew no Roman law from the fact that in words which strikingly recall Philo's he said: "Noxiae poena par esto, ut in suo vitio quisque plectatur, vis capite, avaritia multa, honoris cupiditas ignominia sanciatur."[176] Indeed I am not at all convinced that some lost Roman speculation on penology does not lie directly behind what Philo is saying.

As a derivative statute from the *Lex Talionis* Philo discusses the law of the Torah that any man who so struck his slave that he or she lost an eye or tooth was under obligation to free the slave.[177] Such a law would of course be a complete misfit in ancient society,[178] and it is

[175] See article, "Assault and Battery," *J.E.*, II, 224 ff.

[176] *De Legibus*, III, xx, 46.

[177] §§ 184-204; cf. Exod. 21. 26, 27.

[178] On Greek practice see Lipsius, *Attisches Recht*, p. 428, n. 33; Graeca Halensis, *Dikaiomata*, pp. 109 f. Greek law demanded damages for the

notable that Josephus, writing for Romans, does not mention it at all, although it was living tradition among the Jews, and was by the rabbis made into a general principle, that not only the taking of an eye or tooth, but the permanent maiming of a slave in any way entitled the slave to liberty.[179] Philo neither ignores nor expands the law, but takes the middle course of justifying its letter by extended rhetorical praise of the significance of an eye or tooth in a man's life. Both are essential to true life, he argues, and in addition both are the servants of the slave.[180] As then the slave has lost a servant, so, by the *Lex Talionis*, should the master lose his slave. Philo seems again to be laboring in distress at the necessity of finding some defense for a law which was enforced by his Jewish courts in direct opposition to the social and legal ideas of the environment. It is not extended as by the rabbis, or at least Philo did not recognize any such extension, precisely because, as he clearly shows in his other remarks about slavery, his conception of the institution was quite that of his Greek and Roman neighbors, so that he had no real sympathy with the old law he is discussing. Yet the law stood on the books, and he might have enforced it if a case presented itself which exactly conformed to its letter.

owner of a slave injured by another man, but took no account of such injury inflicted by the owner. Roman law was quite the same.

[179] Ritter, *Philo und die Halacha*, p. 55. Ritter quotes Sallschütz, *Mosäisches Recht*, p. 553, n. 687: "Auge und Zahn ist offenbar nur beispielsweise (als das höchst und mindest wichtige) genannt, und das Gesetz gilt auch für die Beschädigung sonstiger Glieder." See also Ecclus. 30. 38, which seems to refer to this law and to the law against killing a slave when it says to the slave owner in advising him to be a strict disciplinarian: "But do not go beyond bounds with any man, and do nothing you have not a right to do." (As translated by G. F. Moore, *Judaism*, II, 138.)

[180] His argument here, Mangey notes, is quite similar to Plato, *Timaeus*, 47*a* ff.

Another derivative statute from the *Lex Talionis* Philo finds in the old law that forbade a creditor to take a mortgage upon the upper or lower millstones of a miller, since he was taking a mortgage on the man's life.[181] As Heinemann points out at the passage Philo's argument seems to be that this means that anyone who plans to take away the tools by which another man supports himself, is guilty of murder in βούλευσις. So the old law is expanded to mean that mortgages are not to be taken on any necessary tools used in one's self-support. Philo would not, of course, have demanded the death penalty for one who broke this law; his appeal to the legal principle is only to justify his retention of a peculiar law from the Torah. He himself does not mention a penalty, and I suspect that if such a case came before him he would only have declared the mortgage invalid. But emphasis was laid upon this law certainly under inspiration of the similar Ptolemaic law that even for non-payment of taxes a farmer's cattle and tools, a weaver's loom, were not to be confiscated.[182] Likewise, they could not be attached for debt.

Philo's discussion of the laws derivative from the Commandment "Thou shalt not kill" closes with the statement that so very careful is the Law of Moses about any suspicion of murder that it calls unclean the person who has only touched a corpse.[183] Two things are interesting about this law, first the changes which appear in it as compared with the form it had in the Torah, and second the fact that it appears at all in the criminal section of his legal discussion. The biblical law prescribes that any person or object which has touched a corpse, even the tent where the body lay, is unclean for seven days thereafter

[181] § 204; Deut. 24. 6.
[182] Pap. Tebt., 5; ll. 221-247.
[183] §§ 205-209; cf. Num. 19. 11-22.

in any case, and can be purified even then only by mixing ashes, which have been left after the burning of a sin offering, into water, and sprinkling the defiled person or object therewith on the third and seventh days after the pollution, followed on the seventh day by the washing of the body and clothing of the person contaminated. This seems to have been a law of the temple, for the necessary ashes could have been procured only from the temple, and the person who refused to purify himself was subject to excommunication for having thereby defiled the *sanctuary*, as though the person in question would frequently have been going into the temple. So the rabbinical tradition says that the law applies only to one who wants to enter the temple.[184] But as Philo states the law, it requires that a person so polluted should wash and sprinkle himself, apparently with ordinary water, by which process he is made σφόδρα καθαρός. But when such a pure person comes to present himself at the temple, he must then go through the seven days' waiting and purification specified in the Torah, before he can be allowed to enter. The milder form of purification was the one used, and was obligatory, for the house and utensils in the house where a corpse had been, as well as for anyone who had entered the house while it was unclean, or who had touched an unclean object. Heinemann suggests that the temple authorities would not have recognized such an inadequate purification, and would have required all pilgrims from the Diaspora to be specially purified before entering the temple. Philo knew this law then, he admits, from personal experience.

So this much of Philo's remarks on purification seems to Heinemann to be representative of actual practice. But the fact that Philo goes out of his way at all to dis-

[184] *Sifre in loco;* cf. Heinemann's note at Philo's passage.

cuss this law, and yet alters it so fundamentally from the way it appears in the Bible seems to me of deeper significance than Heinemann recognizes. For its mere statement, even in altered form, is not enough. Philo must defend the law with moralizing allegory. Only one conclusion seems possible to me, namely that Philo is stating and defending that form of purification, a substitute for the original command which it was beyond their power to fulfil, which Jews in the Diaspora were actually using with deep conviction of its importance. Pure, in the sense of the Jews at the Temple, no Jew in the Diaspora could keep himself; but purity in its religious sense was still one of their dearest aspirations, and when they observed the substitute traditions they had the satisfaction of calling themselves *σφόδρα καθαροί*. Like the law for washing after sexual intercourse, which Philo brings into his discussion of adultery,[185] and which there is other evidence for thinking was of great importance in the Diaspora, this law of purification seems one of the observances which pious Jews away from Palestine most particularly practiced. Indeed these laws for purification probably bulked very much larger in Jewish life in the Diaspora than one would infer from their slight emphasis in Philo's discussion.

[185] See above, p. 89.

IV

THE DE SPECIALIBUS LEGIBUS

BOOK IV

THE fourth book of the *De Specialibus Legibus* discusses the remaining Commandments of the Decalogue, and the laws derivative therefrom. The first to be considered is, "Thou shalt not steal." Philo deals with stealing chiefly in two passages: first, in connection with the Decalogue, he discusses the nature of κλοπή, under which he includes both theft and robbery, as a fundamental breach of public security;[1] and second in a passage where he brings together the detailed laws in connection with stealing.[2] From the point of legal principles κλοπή appears to Philo to be an attack upon law and order, in which the extent of the actual crime is not to be taken as a measure of the criminal potentialities and aspirations of the offender. But practically he is aware of sharp distinctions between various sorts of stealing, to understand the significance of which it will be necessary to recall the Greek and Roman conceptions of the crime.

In Greek law actions for robbery as well as theft, both of which were originally treated with great severity, had come after Solon to be treated as private matters to be prosecuted only at the initiative of the person injured. Stealing in and of itself was not recognized in Attic law as a crime of great danger to the state.[3] Trial could be

[1] *De Decal.*, 135-137, 171. [2] *Spec. Legg.*, IV, 1 ff.

[3] Vinogradoff, *Historical Jurisprudence*, II, 176; Lipsius, *Attisches Recht*, pp. 438 ff.; Thalheim in Pauly-Wissowa, *Real-Encyc.*, XI, 877. Yet there was a tradition that one who φανερῶς κλέπτει should suffer the death penalty as a κακοῦργος; Xenoph., *Memor.*, I, ii, 62.

brought by two sorts of indictment, the γραφὴ κλοπῆς and the δίκη κλοπῆς. The first was a criminal suit to which it was permissible to resort in cases of theft of more than fifty drachmas, or of theft of ten or more drachmas which occurred in a public place, or of any theft which occurred at night. The penalty might be even as extreme as death for conviction on this indictment. But if the party accusing was unable to get at least one-fifth of the voices of the judges on his side, he was fined a thousand drachmas, so that usually suit was brought in the latter form, δίκη κλοπῆς, and involved a penalty of double the amount of damage, in addition to the restoration of the goods, or to making good their value. This Greek procedure was carried over into Ptolemaic Egypt, where the crime was treated as of a private nature, usually, involving a penalty of double the amount stolen.[4] But Ptolemaic law distinguished between ordinary forms of stealing and open robbery, which had the special name λεία, and which was also normally tried at the initiative of the injured party, but which there is good reason to believe was hunted out by officers of the state, either in coöperation with the injured party or independently. The penalty involved both the award of damages to the plaintiff and a public penalty, especially the confiscation of the κλῆροι, or of all property rights.[5] It is notable that these two crimes were not treated as more or less aggravated instances of the same fundamental crime, but as involving different principles of law, with distinct sanctions, though unfortunately the exact criterion of distinction between them has not been preserved.

Roman law, on the contrary, discussed robbery as a

[4] Taubenschlag, *Strafrecht*, pp. 26 ff.; see especially the important quotation on p. 26, n. 3, from Diod. Sic., I, 80.

[5] *Ibid.*, p. 29.

specially serious sort of stealing. Its treatment was provided for by the law *Vi Bonorum Raptorum*, which was "introduced by the praetor M. Lucullus, probably in 76 B.C., in order to meet the lawless acts committed by large bands of slaves who were kept in farms and pastures at a distance from Rome."[6] By Ulpian the offense is called *crimen publicum*,[7] and while Mommsen thinks that that phrase was not current in earlier jurisprudence,[8] it exactly expresses the intent of the law of Lucullus. The distinction between theft and robbery as made by this law was that robbery always involved the use of force, whether by arms or mere force of numbers. With this law must be associated the laws *Julia de vi privata et de vi publica*, both of which involved *iudicia publica*,[9] which the law of Lucullus did not, though it was closely associated with these laws.[10] The crime of *vis publica*, open use of force to compel anyone to anything, was particularly regarded as a threat against society, and the laws and penalties were in that direction most severe.[11] It is clear that the crime was regarded as particularly dangerous because the criminal might develop into a leader of civil wars.

There can be little doubt that it was this Roman attitude, if not specifically the *lex Julia de vi publica* to which Philo refers in his discussion. In dealing with stealing in general he says:

> The third commandment of the second table of five is not to steal. For he who covetously desires the property of other people is a public enemy of the state (κοινὸς πόλεως ἐχθρός), since he takes away, at least in intention, the property of everyone; though actually, limited by the extent of his ability, he takes the property of

[6] Roby, *Roman Private Law*, II, 216; cf. Mommsen, *Strafrecht*, pp. 655 f.
[7] *Dig.*, XLVII, viii, 2, 24.
[8] *Op. cit.*, p. 10, n. 4.
[9] *Dig.*, XLVIII, i, 1.
[10] *Ibid.*, §§ 4, 7.
[11] *Ibid.*, XLVIII, vi: *Ad legem Juliam de vi publica.*

only some. For his greed (πλεονεξία) is most extremely extended, but actual incapacity enters in to keep him back within a small compass, and he can operate on only a small scale. Accordingly whatever robbers have the strength plunder whole states, unconcerned about a penalty inasmuch as they consider themselves to be more glorious than the laws. For they have the oligarchical nature, and desire tyrannies and dynasties, and bring about great robberies, though they conceal under the name of rulership and governorship what is actually violent robbery.[12]

Philo then goes on to caution youths in a moral lecture against allowing themselves to desire other people's property, in view of the logical outcome of such impulses.

Quite in accord with Roman law, then, and just as distinctly not in accord with Greek law, Philo is representing the biblical commandment as being a legal principle, which conceives of an unbroken succession of crimes of stealing, from the desiring of one's neighbor's property to the disruption of the state itself, the overturning of the legal system by tyrants who claim to be more glorious than the laws. He who does this latter is actually a κοινὸς πόλεως ἐχθρός, he who only desires the property of others is so potentially and in disposition. In using the phrase κοινὸς πόλεως ἐχθρός Philo must be trying to reproduce the Roman conceptions of *crimen publicum*, *iudicia publica*, and the whole intent of both the *lex Julia de vi publica* and the decree of Lucullus. But the *lex Julia* appears even more strikingly suggested in Philo's other statement:

Whoever without authorization drives or carries off the property of another, if, on the one hand, he does it by force and openly (βίᾳ καὶ φανερῶς), shall be reckoned a public enemy (κοινὸς πολέμιος), for he has joined shameless presumption (θράσος) to lawlessness; but if he has done it secretly, trying like a thief to escape notice, and making a veil[13] of shame for his sins, let him be prosecuted by

[12] *De Decal.*, 135, 136.

[13] The MSS and editions read "making darkness a veil," a state-

private action (ἰδίᾳ), since he is liable for prosecution only to the extent of his attempted injury; and let him be penalized at double the amount stolen, atoning thus for his unjust profit by suffering a most just injury (βλάβη).[14]

The distinction here between the more and less serious type of stealing is obviously Roman, as is the conception of the character of the major crime. Its essential characteristic is that it was done βίᾳ καὶ φανερῶς, and hence must be treated in *iudicia publica;* whereas the other is veiled in secrecy, carries no threat of force, and is accordingly tried in private. But in view of his Roman division of the crime, and conception of its nature, it is notable that Philo assigns a penalty only for the lesser crime, and that the penalty he assigns is not Roman, but Ptolemaic and Jewish. Clearly the legal tradition of the private action has remained primarily as in the Ptolemaic period. Philo has no notion of the many Roman distinctions between *furtum manifestum*, *nec manifestum*, *conceptum*, and *oblatum*, and does not treat the thief with Roman severity. The *fur manifestus*, that is the thief caught in the act, and probably the most common of indictments for theft, was by Roman law of the Twelve Tables punished, if he was a free man, by being turned over to the person he had robbed as his slave or *adiudicatus*. This was later softened, says Gaius,[15] into a penalty of fourfold the amount of the theft. But Philo calls only for the Mosaic and Ptolemaic penalty of double the amount of theft in all private cases.[16]

ment which is quite out of accord with what Philo is trying here to say. I agree with Heinemann in seeing τὸ σκότος as a gloss carried over from § 9 below. The passage does not make sense with the words left in.

[14] *Spec. Legg.*, IV, 2.

[15] III, 189, 190. Roby, *Roman Private Law*, II, 210.

[16] Exod. 22.4. Philo is conscious that this Jewish penalty harmonized with Ptolemaic tradition, as appears from his adaptations in the matter of the theft of animals; see below, p. 155.

This mingling of codes, far from being confusing, is most illuminating, since it is a perfect reflection of the legal situation in Egypt under the Roman military supervision in Philo's day. Rome's first concern, after the collecting of taxes, was the guarding of the public peace. So she kept strictly within her own hands the trial of cases which according to Roman criteria seemed a threat against that peace, while she left to local native courts the trial of crimes which she regarded as of a minor nature. The older evidence has been collected by Mommsen, and all points directly to the exercise by the Roman governor of summary legal authority in cases where the public peace was threatened, and more dangerous malefactors concerned.[17] "A proconsul of Asia under Hadrian had a robber tortured. Polemon, under Hadrian, bade the Smyrneans settle matters involving fines by themselves, but keep their hands from those charged with murder, pillaging a temple, or adultery, because these demanded a judge equipped with the power of the sword—by which certainly the Roman governor is indicated."[18] These instances are all later than Philo, but the famous court of Pilate shows clearly that the same power and obligation for keeping the peace lay in the Roman governor's hands at that period as well. Of the four people held by Pilate for judicial action in the gospel account, three, Barabbas and the two thieves, were robbers of the more serious type which Philo has distinguished. For Egypt an excellent illustration of the activity of Romans against robber bands is to be found in the edict of M. Sempronius Liberalis, given 154 A.D., to take care of a special uprising of

[17] *Strafrecht*, pp. 235 ff. See p. 240: "Die Fürsorge für die öffentliche Sicherheit, wie die Statthalter der Republik sie geübt hatten, ist in ihrer Unbestimmtheit und Grenzenlosigkeit der weitesten Erstreckung auf die Criminaljustiz fähig."

[18] *Ibid.*, p. 238, n. 2 (239).

armed bands.[19] Unfortunately we do not learn from this edict what the penalty was, but may reasonably infer from general Roman practice, and from the fact that Roman law in Egypt treated the mere possession of weapons as a crime worthy of death,[20] that use of such weapons in open robbery would carry no milder penalty.

Clearly, then, Philo's remarks about the general nature and treatment of the various forms of stealing conform perfectly to the actual situation in Egypt in his day. A crime such as open robbery, *βίᾳ καὶ φανερῶς*, was treated by Roman procedure, because such a criminal was a *κοινὸς ἐχθρός*, his crime *κοινός*, while the ordinary thief was treated *ἰδία* by local law, in Philo's case by Jewish law. And the discussion throws much light upon the fact that Philo frequently called by this same ominous term other crimes which deserved the death penalty, to be assigned judicially by the Romans, but frequently in practice extra-legally by the Jews.[21] This distinction in crimes corresponds exactly to the generalization which Taubenschlag drew that the prefect alone had criminal jurisdiction in his own right, but delegated minor matters to local officers.[22]

A striking detail shows clearly not only that the court Philo has in mind for trying these smaller cases is the Jewish court, but that it had jurisdiction only when the plaintiff and defendant were both Jews. For Philo's next stipulation is that in case the culprit cannot pay his fine, he is to be sold into slavery (§ 3). This is the Mosaic law,[23]

[19] Mitteis-Wilcken, *Grundzüge*, I, ii, No. 19. See the literature mentioned there.

[20] *Ibid.*, I, ii, No. 13; see Taubenschlag, *Strafrecht*, p. 94.

[21] See above, pp. 78, 86 f.

[22] *Strafrecht*, pp. 96 ff.

[23] Exod. 22.3; Josephus, *Antiq.*, IV, viii, 27 (§ 272), quotes this law as though it required that the thief who could not pay the fine became the slave of the man he had robbed. He probably has Roman practice in mind; see above, p. 149.

which is here quoted unchanged because it harmonized well with Greek practice as indicated by Plato,[24] and probably as current in Alexandria, as well as with Roman practice,[25] and so had not been modified by the Jews. But Philo bids the person thus condemned to slavery not to be too disconsolate, for his slavery could not, by Jewish law, last more than seven years.[26] But since the law requiring the freeing of slaves at the beginning of the seventh year applied only to Jewish slaves owned by Jewish masters, his reference here to emancipation implies that the thief would be in every case a Jew, and accused by a Jew who had been robbed. This corresponds with what must have been the case, namely that the Jewish court had jurisdiction only in cases when both parties in the suit were Jews.

Philo closes his discussion of stealing in general with a defense of the penalty (§ 5). One who steals is justly condemned for three reasons: First, he is guilty of inordinate greed, πλεονεξία; second, he has upset the principle of private ownership; third, the property thus alienated is often held for secret enjoyment by the thief, while in the attempt to escape detection he frequently involves, if only by keeping secret, some innocent man in suspicion or penalty, and so perverts the investigation of truth. This passage is no philosophic rationalization of the sort Philo frequently uses to obscure or escape a difficulty, but is a statement of the recognized principles involved in the crime.

First he condemns πλεονεξία, which might, from his statement, be a reference to the Jewish commandment against coveting, but which is probably included with a view to the vice which was deeply reprehended by phi-

[24] *Laws*, IX, 857*a*. [25] See note 23.

[26] See above, p. 51. Philo refers here (§ 4) to his former remarks on the subject in *Spec. Legg.*, II, 84 and 122.

losophers of almost all schools in Philo's day.[27] From the first Philo has felt that this moral side of the crime was one of its most serious aspects.

The second objection to stealing is made more definitely from a legal point of view, and seems to represent the essential nature of the crime as regarded by Roman jurisprudence. Philo says: "The thief has turned his eyes and desires to the property of other people, and laid a snare to alienate it, depriving owners of their possessions." This was exactly the Roman idea of theft. Q. Mucius Scaevola said that theft was concerned only with ownership.[28] A thief could not sue another thief who stole goods already stolen from someone else, because the first thief did not have true ownership,[29] while in general all rights of suit are based upon a claim of ownership, or of guardianship responsible to the owner. The conception of stealing as being a breach of property rights has appeared from the beginning in Philo's remarks on the subject, and is as distinctly a Roman legal notion as the first objection to stealing was an appeal to common principles of current ethical theory.

And it is just as clear that the third objection to theft turns upon the principles of Greek law. Here the criminality of stealing is made to consist primarily in its secrecy, and the danger to society seems to be fundamentally that of having a secret criminal in its midst. Heinemann has recognized the Greek character of this description of stealing, for in Greek law thieves were classed as κακοῦργοι, whose distinctive characteristic was that they,

[27] See, for example, Arnim, *Stoic, Vet. Fragm.*, III, 130, No. 479. This vice was a virtue only in the king. See my "Political Philosophy of Hellenistic Kingship," in *Yale Classical Studies*, I, 70.

[28] Roby, *Roman Private Law*, II, 213.

[29] *Ibid.*, p. 206.

in contrast with those whose offense was ὕβρις, work secretly.[30]

So Philo has stated his general conception of stealing, and justified it from the best principles of Roman and Greek law, as well as of morality. He now goes on to discuss details of stealing.

A thief, he says, who uses the darkness as a veil to break into a house at night, if he be caught in the house before dawn may be killed on the spot (§§ 7-10). This agrees with Jewish, Greek, and Roman laws,[31] but Philo goes on to justify such a provision. He argues that the night thief is always a potential murderer, for he will come armed, if only with his iron house-breaking tools. Further, at night the police, as well as other private citizens, are not available for assistance, so that every man must be for the time his own police protection and judge. This reference to the thief as a potential murderer was an attempt to make the Mosaic law valid under Roman conceptions, by which a thief might be killed only in self-defense,[32] though any thief caught at night might be killed. But the Romans required that before killing there was to be a cry, as a kind of notice to the public, both in day or night killing,[33] apparently to give the public, official and private, opportunity to interfere, on the understanding that in their absence, and only so, the man at-

[30] See Heinemann's note *ad loc.*, p. 249, n. 1.

[31] Exod. 22. 2, 3: "If a thief be found breaking in, and be smitten so that he dieth, there shall be no bloodguiltiness for him. If the sun be risen upon him, there shall be bloodguiltiness for him." For Greek law see Demosthenes, *Adv. Timocr.*, 113; Lipsius, *Attisches Recht*, p. 438. For Roman law see *Leges XII Tab.*, *Tab.* VIII, 12; Bruns, *Fontes Juris Rom.* (7th ed.), p. 31.

[32] *Collat.*, VII, 2-4; Roby, *Roman Private Law*, II, 212.

[33] Roby, *op. cit.*, II, 210; *Dig.*, IX, ii, 4, 1: "Lex duodecim tabularum furem noctu deprehensum occidere permittit, ut tamen id ipsum cum clamore testificetur; interdiu autem deprehensum ita permittit occidere, si is se telo defendat, ut tamen aeque cum clamore testificetur."

tacked must have the right to be his own judge and executioner. But in the daytime, with men available on every side, and plenty of policemen, it is a bit of high presumption to take the law into one's own hands, and in passion kill a man who is stealing; it is, indeed, a worse crime than the theft itself. Since the Torah does not make provision for a case where a day thief may have to be killed in self-defense, Philo does not mention it either. But nothing that he says excludes the Roman conclusion that when, even in daytime, the needed assistance in spite of cries for help does not arrive, a man might then act for himself as well as in the night. Philo has put the old Jewish law upon a thoroughly Roman foundation.

From housebreaking Philo goes on to discuss theft of animals (§§ 11, 12). Here he must rationalize another awkward command of Scripture. For while his general penalty for theft is the payment of a fine equal to double the amount of the peculation, the Torah stipulates that for one sheep stolen four sheep must be restored, for one ox, five oxen.[34] Such a contradiction drives him to allegory as the only possible way of reconciling the penalty with his conception of justice. So, after first isolating these cases by stating that the general penalty for theft is double, he explains that there is this unique variation in the case of sheep and oxen because of their peculiar natures. The sheep gives four kinds of products, milk, cheese, fleece, and a yearly lamb, and the ox five.[35] Philo's allegorical defense again leads me to conclude that this peculiar law of the Torah was actually enforced among the Jews, for otherwise Philo would have passed over it in silence, but if it was enforced, it was not by any means

[34] Exod. 22. 1.

[35] Heinemann, *ad loc.*, suggests that this explanation of the sheep and oxen developed from Stoic ideas as found in Cicero, *Nat. Deor.*, II, 158 ff.

to be expanded into a principle which would interfere with the general practice in regard to penalizing theft, a practice which, as has been seen, was the same by both Jewish and Ptolemaic law.[36]

The kidnaper of free men who sells his captives into slavery Philo classifies as a most extreme sort of thief (§§ 13-19). The provision of the Torah as Philo knew it for such an offense covered only the stealing of fellow Israelites, for the more general law in Exodus 21. 16 was mistranslated in the Septuagint so that it applied only to Jews.[37] The biblical penalty was death, which agreed with the extreme penalties of Greek and Roman law,[38] though in both a heavy fine was sometimes imposed instead of the capital penalty. So Philo says:

"Let the court assign penalty at its own discretion in cases of the kidnapping of members of another race, but let the death penalty fall inevitably upon those who have not only kidnapped but sold members of their own tribe" (§ 19).

One wonders whether the law is thus not left open because the Jewish court would have no jurisdiction in case of a Jew who had stolen a Gentile. Philo sees a great difference between the criminality of the offense of kidnapping a member of another race as compared with kidnapping a member of one's own race, though in either case the crime is sweepingly denounced. But however wide the Jewish jurisdiction may have been, the law is in perfect form for use under the Roman administration in Egypt.

[36] See above, pp. 146, 149. [37] Cf. Deut. 24. 7.

[38] Beauchet, *Histoire du droit privé de la République Athénienne*, II, 412. By the *Lex Fabia:* "Si liberum hominem emtor sciens emerit, capitale crimen adversus eum ex lege Favia de plagio nascitur, etc.," *Dig.*, XLVIII, xv, 1. See Mommsen, *Strafrecht*, pp. 780 ff., and Whittuck in *Dict. Classic. Antiq., s.v. Plagium;* Xenophon, *Memor.*, I, ii, 62.

Philo also treats under theft the subject of rural property damage (§§ 20-29). First is the matter of damage done by allowing or causing one's flocks to graze on a neighbor's land (§§ 20-25). In such a case Philo says that it is the law of the Jews that penalty is to be paid to the extent of damages. The Torah reads on this point in the Hebrew that payment of the damages is to be made from the best of the culprit's own field and vineyard,[39] which would imply that use of the same amount of acreage or vineyard should be allowed in return for that trespassed, but that in all cases the land or vineyard given in return should be chosen from the best part of the trespasser's estate. Such a payment in kind presumed that the defendant would get the better of the exchange, though in case a man who had a poor farm trespassed upon a good one, paying the injury by turning over an equal acreage from the poor land was hardly adequate compensation. It is probably for this reason that the Septuagint slightly blurred the meaning, and read that damages were to be paid *ἐκ τοῦ ἀγροῦ αὐτοῦ κατὰ τὰ γένημα αὐτοῦ*, though an additional phrase returns to the Hebrew conception by stating that if the entire value of a field has been destroyed restitution is to be made from the best of the culprit's possessions. In contrast with both these statements of the law Philo calls for restitution to the extent of damages, though whether it was to be paid in money or by a piece of land depends upon a disputed reading of the text,[40] with my own feeling that the traditional text is right, and that Philo, like the rabbis later,[41] proposed

[39] Exod. 22. 5.

[40] § 22. Heinemann prefers, like Cohn, *τμῆμα* instead of the traditional *κτῆμα*

[41] Ritter, *Philo und die Halacha*, p. 60. I agree with Heinemann that nothing can be concluded from the fact that Philo does not mention the second clause of the Septuagint form of the law, which allowed one

a fine in money. But even so he indicates that he is aware that his reader will consider his penalty unduly mild. The reason he thinks so is not far to seek. Under Greek law such a case would be tried by action of δίκη βλάβης,[42] which appears from our slight evidence to have been the form also used at Alexandria,[43] and to have been continued under Roman administration, since the Greek action was sufficient to satisfy Roman principles.[44] For while ordinarily in Athens action for property damage carried penalty, like Philo's, only to the extent of the damage done, the judge was not merely to be the arbiter of claims by determining the extent of damage, but he was also to ascertain whether or not the injury had been done maliciously, in which case the damages were to be doubled. But the case which Philo has from the Torah is one of deliberate action, where the herdsman has pastured his flocks intentionally upon another man's ground. To make the penalty of simple damages justifiable, then, Philo says that while this may appear too lenient a law, consideration must be taken of the difficulty attendant upon always keeping flocks grazing just where they ought to graze, and that he should be given the benefit of the doubt and assumed to have done his best to get them out when they had gone in. The defense reveals what Philo would have wanted done. In case the malicious intent was too obvious to be ignored he would undoubtedly have

whose property had been totally destroyed to take compensation from the *best* of the ravager's fields. Philo seems to me to be making the penalty over into a money fine, and to be ignoring details of the original law on that account.

[42] Lipsius, *op. cit.*, p. 663. Philo refers to this sort of action in §§ 26, 29.

[43] Taubenschlag, *Strafrecht*, pp. 30 ff.

[44] "Hier ist alles beim Alten geblieben." Taubenschlag, *op. cit.*, p. 90. On property damage in Roman law see Mommsen, *Strafrecht*, pp. 825-833. Jörs, *Geschichte und System des römischen Privatrechts*, 1927, pp. 177 ff.

followed the Greeks in imposing a heavier fine. It is possible that his courts would have had no jurisdiction in such a case, and that what he is trying to do is only to square the Torah with the Greek law administered by Greek officers. For he says specifically that the case would have been heard by an ἀγρονόμος, a sort of officer which, he says, would be always provided by the best ordered states, πόλεις, to correspond in activity outside the city walls to the functions of the ἀστυνόμος inside the walls.[45] While it is probably safe to say that cases in the city involving the δίκη βλάβης were heard by one of the ἀστυνόμοι in Alexandria, where laws regulating such matters would have been a part of the νόμος ἀστυνομικός of Alexandria,[46] no mention of an officer with the title ἀγρονόμος has yet appeared in the papyri. Still it is quite possible that such an officer did exist for the suburbs of Alexandria, and that Philo's remark indicates an office of which we hitherto had no knowledge, and which had jurisdiction over Jews as well as Gentiles. But if there were such an officer by Greek provision in Egypt, it seems to me that Philo is here referring to a Jewish rather than the Greek administrator, probably to that officer of the Jewish system of courts who supervised the life of those Jews who, from Strabo's words, seem to have been living through the countryside in Egypt.[47] If Jews were to be found scattered thus in the rural sections, it is highly probable that they would have had some such magistrate to whom they could appeal. Indeed it would seem to clarify a passage in the *Letter of Aristeas* (§ 111), where there is almost certainly a reference to the same office:

[45] § 21. On the ἀγρονόμος see Thalheim in Pauly-Wissowa, *Real-Encyc.*, I, 904. The most important passage is Plato, *Laws*, VI, 760 ff.

[46] See *Dikaiomata*, p. 40, and Oehler in Pauly-Wissowa, *Real-Encyc.*, II, 1870 ff.

[47] See above, p. 16.

"Since he considered the matter (of rural justice) one of great importance, he appointed also legal officers for every district with their assistants." There seems no doubt then that there were Jewish rural magistrates. In comparing what Philo says with offices we know from the papyri, it appears that his ἀγρονόμος bears some resemblance to at least two officials, whom we know by other names.

Most similar from the point of view of terms is the ἀγροφύλαξ, who appears for the first time only as a name in a list of village officials of the late second or early third centuries, where the line in question reads φύλακες οἱ καὶ ἀγρ[ο]φύλ(ακες).[48] If the re-construction is correct this is the earliest mention of the office, and tells nothing of the official's functions. The next mention of the office is in a petition of 346 A.D.,[49] to Flavius Abinnaeus, *praefectus castrorum* at Dionysias asking redress in case of rural trespass and theft. The plaintiff has been robbed of nine sheep, and when the ἀγροφύλαξ made search he found the sheep in the field of certain men against whom she wishes Abinnaeus to take action. Here then the ἀγροφύλαξ has the police function of hunting out the offenders, but no juridical power. Kenyon notes that it is remarkable that the names of all parties to the suit are Jewish. But the office was not a Jewish office, for the ἀγροφύλαξ appears in several other papyri from the fifth to the seventh centuries[50] with various functions, primarily, apparently, that of guarding the irrigation system. One of the many kinds of φύλακες of Egypt was a

[48] *Pap. Oxyr.*, 2122, l. 11 (XVII, 217).

[49] *Gk. Pap. in Brit. Mus.*, 403, l. 11 (II, 276).

[50] E.g., *Pap. Oxyr.*, 141 (A.D. 503); 1831 (late fifth century); 1835 (late fifth or sixth century); 1913 (*c.* A.D. 555); 2033 (seventh century); *Pap. Soc. Ital.* (Firenza, 1912), 47 (sixth century); *Pap. Brit. Mus.*, 1032 (sixth or seventh century).

guardian of the Nile, and the ἀγροφύλαξ seems to have been primarily only his rural representative in that duty, watching the canals in the more remote sections, though obviously having some police powers as well.[51] There is thus little resemblance between the ἀγροφύλαξ and the ἀγρονόμος of Philo except that both are rural.

An officer mentioned in earlier papyri, and one whose functions seem in some details more like Philo's ἀγρονόμος, is the ἀρχέφοδος.[52] This office probably came into existence in Ptolemaic times, for an officer of that name is mentioned in a papyrus of the first century B.C.[53] But in Roman times he is of increasing importance, a local police officer displacing the earlier ἐπιστάτης τῆς κώμης, who had been provided with considerable judicial powers. Jouguet thinks that this displacing was a part of the policy of the Roman administration, since he saw in the ἀρχέφοδος only a local police officer, with no judicial power. If such an officer came to supplant the ἐπιστάτης, he argues, it was because the Romans wanted to concentrate judicial power in their own hands, and so emphasized the local policeman without judicial power, while it neglected the ἐπιστάτης who had such power. The normal procedure was for complainants to go to some Roman official, such as the στρατηγός, or the ἐπιστάτης φυλακειτῶν, who would send down an order to the ἀρχέφοδος to apprehend and send up the accused, or to make local investigation and arrests.[54] But it is upsetting for Jouguet's

[51] On the φύλαξ see Lumbroso in *Archiv für Papyrusforschung*, VII, 221 f.

[52] On this office see especially N. Hohlwein in *Le Musée Belge*, XI (1907), 203 ff.; Jouguet, *Vie Municipale dans l'Egypte Romaine*, p. 217. Oertel, *Liturgie*, pp. 275 ff.

[53] *Pap. Tebt.*, 90.

[54] As, e.g., in the Rylands collection, 126, 131, 136, 138, 139, 140, 142, 143, 145-148, 150-152. The ἀρχέφοδος appears at least as late as the fourth-

theory that we know now of at least one case where complaint in a matter of damage to crops by trespass was made directly to the ἀρχέφοδος, with the plain implication that he was to be the judge as well as the constable.[55] The ἀρχέφοδος then did have judicial power in smaller damage and trespass suits. The office was usually τῆς κώμης, but in *Pap. Fay.* 24 the term ἀρχέφοδος ἐποικίου appears. The editors of the papyrus, as well as Hohlwein, warn that this is a unique case, and that one must not generalize that every ἐποίκιον had its ἀρχέφοδος. Perhaps it was this very irregularity which prompted Philo to say that in every community there would be an ἀγρονόμος to correspond to the ἀστυνόμοι. Philo's ἀγρονόμος may possibly be the Jewish counterpart, for a Jewish community, of the ἀρχέφοδος of the Graeco-Roman system, with quite similar powers, especially in having power of petty jurisdiction over minor rural disputes.

But on the whole I am inclined to think that Philo, in speaking of the ἀγρονόμος, is referring to no specific officer, but only to the rural magistracy of the Jews in general, under the learned form of Plato's terminology.[56]

Damages in the country might also arise from a fire which had spread beyond control (§§ 26-29). The scriptural law to which Philo refers for this matter says of the penalty only: ἀποτίσει ὁ τὸ πῦρ ἐκκαύσας,[57] that is, the one who has kindled the fire shall pay, with the assumption that he is to make good the damage done. Philo puts the law into better legal form: ἀποτινύτω τὸ βλάβος ὁ τὸ πῦρ ἐμβαλών,[58] by which it is to be assumed that the

fifth century (*BGU*, VII, 1630, A, iii, 24); in the third century he was still making arrests for higher officers: *BGU*, VII, 1569.

[55] *Pap. Ryl.*, 132, of A.D. 32. [56] See above, p. 159, n. 45.

[57] Exod. 22.6.

[58] Cf. Plato, *Laws*, 843*e*: καὶ ἐὰν πυρεύων τὴν ὕλην μὴ διευλαβηθῇ τῶν τοῦ γείτονος, τὴν δόξασαν ζημίαν τοῖς ἄρχουσι ζημιούσθω.

penalty would have been assigned on the principle of the δίκη βλάβης just discussed. The character of action and penalty has thus been indicated by Philo in terms of Greek legal categories. But Philo also states that the object of the penalty is to teach the offender in future to be more careful, after having indicated that the fire of which he is thinking is one which has done damage through having been neglected. "It is never right to leave a fire unguarded in a house or in the open." So the law, he says, is directed against those who kindle a fire, ἀπερισκέπτως καὶ ἀπροοράτως. That is, the defendant is at fault by reason of his carelessness. While there is a hint of the same consideration in Plato's remark about damage from fire,[59] in general the Greeks had very little to say of carelessness as a criminal consideration.[60] But the Roman Aquilian law stipulates as a principle in matters of property damage that each man is responsible for penalty not only by reason of malicious intent against another person's property, but also for carelessness, *culpa*, which is defined as failure to foresee what could have been foreseen.[61] Ritter is able to adduce from a much later Halacha a corresponding provision that one who took reasonable precautions in lighting the fire was not responsible for unavoidable developments.[62] But Philo seems to be much closer to Roman than to rabbinical law, which latter, being itself so late, may well have been inspired at this point by Roman conceptions. Philo's making a distinct legal principle of the ele-

[59] See preceding note.

[60] The nearest approach seems to be Aristotle's remark: *Rhetoric*, I, 1374*b*, 6-9.

[61] Gaius, III, 211: "Impunitus est qui sine culpa et dolo malo casu quodam damnum committit." See Mommsen, *Strafrecht*, pp. 829 f., and Leonhard in Pauly-Wissowa, *Real-Encyc.*, IV, 1748 ff. *Dig.*, IX, ii, 31: "culpam esse, quod cum a diligente provideri potuerit, non esset provisum."

[62] *Philo und die Halacha*, pp. 60 f.

ment of carelessness is not, so far as I know, paralleled in any early halachic comment. Rather does it seem that Philo is keeping very close to actual practice, which here, as in so many other places, seems to have been adopting as rapidly as possible Roman refinements into their own jurisprudence.

The last part of Philo's discussion of the laws derivative from the commandment against stealing is devoted to the laws regulating deposits and loans (§§ 30-38). In the absence of reliable banks and safety storage places,[63] and when all wealth but that in land was represented by movable objects, animate or inanimate, everyone had occasionally, if not frequently, to have recourse to intrusting all or much of his property to the safe-keeping of friends. Consequently there grew up in all countries a moral sense which hedged the holding in trust of another's goods with a sanctity and importance to which nothing exactly corresponds in modern society; and this moral sense everywhere expressed itself in legislation. So in reserving this aspect of property law to the end, and in describing the act of intrusting goods as the most sacred of all property transactions, he is speaking quite in the spirit of his age.[64] Loans, he says, are in quite a different category from deposits, for they are guaranteed by documents, or else made before witnesses, whose value, he implies, is that the lender could always produce legal evidence of his claim if he had to sue for recovery of the goods he had loaned.[65] But a deposit, Philo explains,

[63] The Ptolemaic State Bank (see Tarn, *Hell. Civiliz.*, p. 153) seems not to have made the system of deposits superfluous.

[64] Heinemann, *ad loc.* (p. 255, n. 2), gives several illustrations from Greek and Roman writers which could easily be multiplied.

[65] *Pap. Hamb.* No. 2 (Juster, *Les Juifs dans l'Empire Romaine*, II, 68) was the document which guaranteed a διαθήκη which had been publicly acknowledged before the ἀγορά̀νομος of Babylon. On the basis of Philo's distinction this transaction would not be a deposit at all, but a

where goods are left with a friend for his protection, not for his use, are usually left in the strictest secrecy, so that no one will know of the whereabouts of the goods, by which their protection is made much easier. In such a case if the receiver prove untrue it is next to impossible to establish a claim against him. The only real guarantee is the sense of sanctity with which such acts of trust are regarded. The large number of written guarantees of deposits which survive among the papyri show that Philo's Jewish custom was in this not like the usual custom of his neighbors, though the case ἀμάρτυρος indicated by Isocrates shows that Greeks were familiar with unguaranteed deposits.[66]

Philo's legal provision for deposits follows the law as stated in Exodus 22. 7-13 as far as practicable, then branches out independently. If the goods are being kept, he says, in good faith by him to whom they have been intrusted, but are stolen, and the thief can be found, the guardian of the goods is to pay the owner double their value. That is, as I would understand it, the receiver himself advances the damages he would expect from action for theft,[67] and takes the burden of suing the thief. But in case the thief is not to be found, and the goods are irretrievably lost, the receiver must go with the depositor directly to the divine tribunal (ἐνώπιον τοῦ θεοῦ), and he whom God shall condemn shall pay the other double damages. This all appeared to Philo as a workable pro-

loan, and so it is called διαθήκη, agreement, and not παρακαταθήκη, deposit. Juster seems to have missed the point here. But as one party was a Roman, Jewish law and terminology did not come into question. Similarly all the extant papyri records of Jewish transactions (see Juster, *loc. cit.*) involve business between Jew and Gentile, and so fall under gentile law. Meyer, *Jurist. Pap.*, No. 30.

[66] Mitteis, *Grundzüge*, II, i, 257-259. Isocrates, *Adv. Euth.*, 4: Lipsius, *Attisches Recht*, p. 736.

[67] See above, pp. 149 ff.

gram, except for the penalty allotted by the divine tribunal.

For Philo's process in such a case recognizes that the sanctity of the deposit is established by the fact that, lacking witnesses or written evidence, the third party which guarantees the transaction is God himself. Apparently God was always called to witness when deposits were made, for Philo says: "The invisible God acts in every case as the middle party (μεσιτεύει) in invisible matters, and he is properly called to witness by both parties, by the receiver that he will restore the deposit upon demand, by the depositor that he will recover the goods at the time specified" (§ 31). This is a natural development for Jewish tradition to have made from the fact that the Torah bids a default in such a trust to be referred to God's tribunal, and in another passage treats forfeiture of deposit, along with robbery, extortion, and the like, as a trespass against Yahweh.[68] The same development is reflected in Josephus, who, while he differs from Philo in other points in the matter of deposits, regards God and conscience as the witness of our deeds, "from whom no wicked man can lie concealed."[69] Josephus does not suggest the oath of deposit, nor, so far as I know, does the halachic tradition do so, though sayings attributed to early rabbis do presuppose the active sense that God was the mediator in deposits.[70] So when the de-

[68] Lev. 6. 1 ff. The passage calls for a penalty of restoration of goods, plus one-fifth their value as damages; but the whole is only a prelude for the priestly requirement of sacrificing a ram to Yahweh as a trespass offering, and was ignored by Philo from the legal point of view, though he properly considered it in his sacerdotal discussion of victims for sacrifice: *Spec. Legg.*, I, 234 ff.

[69] *Antiq.*, IV, viii, 38 (286). Weyl, *Jüdische Strafgesetze*, p. 130, n. 3, is quite right in rejecting Ritter's suggestion that Josephus has borrowed here from Philo.

[70] See the statement ascribed to Rabbi Akibha from *Sifra Wajjikra, Dibbura d'chobha*, Par. 12, Perek 22, 4, quoted by Weyl, *loc. cit.*, espe-

positor demands return of the goods, if the receiver claims that they have been stolen from him, and the thief be caught, Philo retains the scriptural process whereby the receiver pays the depositor double the value of the goods, since he, it is still understood, can collect from the thief. Parenthetically, this restoration of double the amount defaulted would have been valid by the standards of Philo's neighbors, since two papyri contracts for deposit say expressly: *ἐὰν δὲ μὴ ἀποδῶ, ἀποτισάτω τὴν παραθήκην διπλῆν κατὰ τὸν τῶν παραθηκῶν νόμον.*[71] But if Philo's legal tradition can use this much of the biblical law, it strikes out alone in the case where the deposit has been lost without trace. For while Philo, like the Torah, depends in such a case upon an ordeal by oath, yet his ordeal is not one in which both parties participate, and one of the two must always supply a penalty to the other of double the value of the goods, as Scripture provides. In contrast to the Torah the purpose of Philo's ordeal is only to give the receiver opportunity to clear himself of liability for the loss, and to protect both parties, on the principle, as Philo explains it, that an act done thus in friendship should not involve a penalty for either when neither of the two has been guilty of bad faith.

Lacking the deposited goods, then, the receiver goes to the divine tribunal (*θεῖον δικαστήριον*) to clear himself by oath. Whether Philo understood by this some special court, or is alluding to the divine sanction of a regular Jewish court, or is referring to the fact that the oath is

cially the phrase "If he now denies (the deposit), he thereby repudiates the third party (God) who was between them."

[71] *BGU*, 856; *Lond.*, 2, p. 206; Mitteis, *Grundzüge*, II, i, 258. Cf. Meyer, *Jurist. Pap.* No. 30 (introd.). Paulus, *Sentent.*, II, xii, 11: "Ex causa depositi lege duodecim tabularum in duplum actio datur, edicto praetoris in simplum." See Roby, *Roman Private Law*, II, 94. The penalty in Attic law is not known, but Lipsius (p. 738) thinks that it would have been double as in Gortyn.

made in God's presence, and hence at His tribunal, is not to be ascertained. Josephus[72] refers such action to the "seven judges," but what this means we also do not know. Before this court, then, of whatever nature, Philo now relates that the procedure was to clear oneself by oath, which, surprisingly, he describes as being taken by raising one's hands to heaven, and swearing *κατ' ἐξωλείας*, that is calling down upon oneself all the most horrible execrations if the accompanying statement were not true. Here appears the first foreign-sounding element in the hitherto unbrokenly Jewish exposition of the subject. Josephus describes the oath as being taken simply "by God" (*ὀμνύτω τὸν θεόν*), which is quite in accord with halachic tradition.[73] But Philo's oath is familiar as the strongest oath of Greek legal practice,[74] and seems to have been the form used in adjuring Yahweh on this occasion, since Philo's next remark seems to describe the actual oath taken. The defendant swore, first that he had not appropriated any part of the deposit, second that he had not been accomplice with another (in theft of the goods), and third that he had not in any way pretended that there had been a theft when one had not actually occurred.[75] This oath, so far as loss of goods by theft was concerned, would have left no possible loophole of evasion, and upon taking it the receiver was freed of all responsibility in the matter. But it is inconceivable that this oath would have been adequate in all cases of default, and so it is interesting to see that rabbinical tradition developed quite a different form of oath. The receiver, according to that tradition, swore that he had been guilty of no carelessness in watching the goods, second that he had made no per-

[72] *Loc. cit.*, § 287. [73] Weyl, *op. cit.*, p. 133, n. 10.

[74] See, for example, Demosthenes, *Adv. Meidion.*, 119.

[75] *Μήτε τι μέρος τῆς παρακαταθήκης νοσφίσασθαι μήτε ἑτέρῳ κοινοπραγῆσαι μήτε ὅλως συνεπιψεύσασθαι κλοπὴν οὐ γενομένην.* § 34.

sonal use of the deposit, and third that he did not any longer have it in his possession.[76] While this oath was by no means so thorough as Philo's for renouncing any responsibility in loss of the goods by theft, it did cover cases which must frequently have arisen, when the goods had been used to their detriment by the receiver, who was thus guilty of default, though not as a thief. Josephus takes this case into consideration, and allows single damages for default of this kind. Similarly Philo's oath makes no provision for neglect, even criminal neglect, on the part of the receiver in guarding the deposit. There must then have been other forms of oath, and other kinds of action, in connection with deposits, which Philo does not mention in this passage, since he is following the scriptural law. He is quite content with reporting only so much of the law of deposits as biblical law suggests: so, like the Torah, he discusses only cases where the receiver claims that the goods deposited have been stolen from him. It is unfortunate, but true, that Philo is not writing a digest of the Jewish law in use in his day, but only demonstrating the practicability of the laws of the Torah. But it is very fortunate that he has given so accurate a picture of proceedings for cases of at least this sort of default, and it is to be noticed how greatly his version of the law improves the original provision. The double damages of the Torah which either the receiver or depositor must pay to the other as the court judges between their two oaths are omitted as quite impracticable.

It is significant to compare this process with a bit of Ptolemaic law.[77] In case a man was suspected of withholding oil to the detriment of the royal oil monopoly a search might be instituted in his house. If the search was

[76] Heinemann, *ad loc.;* see also Weyl, *op. cit.*, p. 135.
[77] *Rev. L.*, 56, lines 7 ff.; Taubenschlag, *Strafrecht*, pp. 34 f.

unsuccessful the man at whose instigation it had been made was compelled to go to the temple and take oath that he had conducted the search in good faith for the reason alleged. If he refused to do so within two days the householder could demand a double penalty for the damage which the ὕβρις of the search had caused him. There is a significant parallelism between this and Philo's treatment of the defaulting receiver of deposits, for in both cases men are compelled to clear themselves of suspicion of criminal bad faith by taking oath, the one before the "divine tribunal," the other in a temple. The assumptions and ideas behind Philo's law are identical with those behind the Ptolemaic.

Special modifications had to be made for deposits of animals, to provide for cases when the animals died on the receiver's hands through no fault of his own (§§ 35, 36). The scriptural law is here again simplified and made workable.[78] The Torah prescribes that if a deposited animal die, be hurt, or driven away without trace ("no man seeing it"), the receiver shall clear himself with an oath, with which the owner must be satisfied. But if the animal has been stolen the receiver is to make restoration, while if it has been torn to pieces by wild beasts the owner is to be shown the remaining fragments. The difficulties in this law lie in its loose reference to theft, and in the lack of provision for cases where the owner, unable to indemnify himself from the thief, should be able to swear off responsibility, as in the other sort of deposit. Characteristically, then, Philo simply reduces the law to practical form by declaring the right of the receiver to clear himself of suspicion with an oath if the animal is lacking when demanded by the owner. "When the depositor returns, the receiver must swear that he is not concealing an

[78] Exod. 22. 10-13.

unjust peculation by falsely alleging that the animal is dead," a law which, if not justified by any specific statement in the Bible, would yet harmonize excellently with the principles of the courts in Alexandria.

But in the Torah there is an important doubling of the laws of deposit of animals, for there appear to be two scraps of legislation from different sources, and with different treatments of the problem. Exodus 22. 7-13 contains both these sections on deposits, verses 7 and 8 apparently referring to deposit of inanimate objects, and verses 10-13 to deposit of animals. But verse 9, as Heinemann points out,[79] also mentions animals, though Heinemann does not take into account the fact that verse 9 is quite out of place, and is a distinct law dealing with lost and found property, and having nothing to do with deposits at all. But on the basis of this law's being here, he says, the rabbis took the first section on deposit as referring to deposit where the receiver had been paid for his services, and the second section as referring to receivers who had acted merely out of friendliness. The only reason to justify such a distinction is that in the first section the penalty of default is double, in the second only simple restoration of the deposit. As Heinemann says, in practice such a distinction would be most fair, since the man acting for pay must have been held more closely than he who took all the risk without compensation. Ritter[80] had discussed this point, and concluded that Philo's cutting the knot and ignoring all contradiction, in order to make a simple and workable law, reflected practical procedure, specifically of courts at Alexandria. But Heinemann comes to the astonishing conclusion that since Philo did not, like the later rabbis, make the useful dis-

[79] *Ad loc.*, p. 258, n. 1.
[80] *Philo und die Halacha,* pp. 63 ff.

tinction between the paid and unpaid receivers, he must therefore have no practical law behind his remarks at all. Reduced to a syllogism Heinemann's argument is: A distinction between paid and unpaid receivers must have been made by all practical courts handling such matters; but Philo does not mention any such distinction; therefore what Philo says of deposits cannot be practical law. The reasoning is of course fallacious, because it assumes that either Philo is giving a complete digest of the law enforced in the Jewish courts at Alexandria, or else is giving no part of that code. The assumption that the Jewish courts in Alexandria must have made some such distinction in assigning penalties is plausible, but that by no means necessitates that in making that distinction those courts tied it back artificially to the texts of Scripture used for that purpose by the rabbis later. And if they made the distinction Philo was under no obligations to report it, for he is telling only so much of the law as justifies his claim that the Torah is the best of all practicable codes, and consequently is throughout omitting more of the Jewish practice than he records. It is very likely that, although he does not discuss the law of lost articles in verse 9, he understood it and applied it as originally intended. But what he may have done with verse 9 in no way detracts from the fact that he handles the other verses in a way to suggest a most common sense legal tradition, which ignored difficulties of detail to give equitable decisions when the traditional code became impracticably involved. It may be well to point out in this connection that the difference between my approach to Philo's law and that of Heinemann is here perfectly illustrated. Dr. Heinemann is primarily a scholar with the talmudic point of view, interested in Philo as a precursor of the great traditions of his race. So where Philo agrees

with the later rabbis, he inclines to recognize that Philo is recording Jewish practice, but when Philo disagrees with the halachic tradition as we have it from later generations, Heinemann thinks Philo is writing his own impractical and personal theories. So while Dr. Heinemann's great learning has led him to recognize that the remarks of Philo are permeated with suggestions from Greek and Roman law, and while his pointing out of these parallels has been a work of very great use, yet his impatience at departure from the rabbinic tradition has blinded him to the significance of Philo's departures. He cannot conceive, apparently, of a body of Jews who had developed a tradition of practical law which largely consisted of non-Jewish elements. It is rare that he mentions the possibility of a law of Philo's as being practical law, but when he does so his argument, as here, singularly misses the true nature of what Philo is saying.

Philo exhibits the same practical turn in discussing the regulation of liability in loans (§§ 37, 38). The biblical provision is that a loan of an inanimate or animate object, if not returned for any reason, is to be made good by the borrower, unless the owner was present when the object was injured or stolen, or when the animal, if such it was, died. This exception is then explained, "If it be a hired thing, it shall be to him (or he shall have it) instead of his hire."[81] This statement, which seems meaningless both by itself and in the context, was apparently as difficult to understand in Philo's day as it is now, for Philo omits it entirely, and while he retains the main idea of the scriptural provision, does so with his own explanation of the principle involved. The whole question, Philo reasons, is one of the abuse of the loan. If the loan cannot be returned, and the owner was not himself witness to

[81] Exod. 22. 14, 15: *ἐὰν δὲ μισθωτὸς ᾖ, ἔσται αὐτῷ ἀντὶ τοῦ μισθοῦ αὐτοῦ.*

what happened, many suspicions might arise as to whether the borrower were really free of blame in the matter. If it was an animal he might have killed it by overworking it, or if a utensil he might have worn it out, or else it might have been exposed to thieves by inexcusable carelessness. But if the owner was present, and himself saw how the object was being used, what precautions were being taken for protection, and the like, the owner himself, Philo says, is witness to the fact that there has been no pretense in the matter. This is of course not adequate law for the regulation of loans, but Philo has developed the original scriptural provision very well. As far as he goes he has stated an excellent and workable law for the regulation of borrowing. He has really appealed to the principle of contributory negligence on the part of the owner. If the owner was aware that he had loaned his goods to a man who was abusing them, but still did not withdraw his loan, even though the abuse was going on under his own eyes, he had little appeal to make in case of an unfortunate outcome. It is interesting that this explanation of Philo's was familiar to the later rabbis, though hardly, we suspect, from Philo's own writing, and was definitely rejected for a more fanciful interpretation.[82] The law of Philo seems to have been that current in his day.

With this section Philo has completed what he has to say of the commandment against stealing, and its derivative statutes, and so turns to the next commandment, making the transition like an organist's modulations by inserting an allegorical paragraph on the suitability that a discussion of false-witness bearing should follow a discussion of stealing (§§ 39, 40).

False witness, he says,[83] is condemned in the Decalogue

[82] Ritter, *op. cit.*, p. 66.

[83] *De Decal.*, 138-141.

for several reasons: First, it corrupts the sublime truth; second, the person giving false testimony shares thereby in the guilt of the guilty party; third, and still more grievous than these, he is guilty of wilful perversion of justice. In legal procedure, he says, evidence is usually oral or written, and it is only in the lack of evidence that recourse is had to witnesses. Hence the judge is dependent in such a case upon the witness, and the one giving false testimony deliberately makes the judge give wrong sentence. But in doing so the judge breaks his oath of office, so that the person who by giving false testimony has caused the judge to do so is guilty of a maliciously sacrilegious act (*ἀσέβεια*). This seems at first to be a strangely circuitous treatment of such a crime as false witness. But Philo knew exactly what he was about. It must be remembered that he is here trying to explain to his Graeco-Roman neighbors that the Mosaic code was quite justified in putting false-witness bearing as one of the cardinal offenses known to law. The first two of his arguments seem only a philosophical flourish, but the third and fourth have important legal connotations, to understand which it may not be useless to review the conceptions of the ancient world as to false witness.

Among the Greeks false-witness bearing was regarded as a serious offense, but not as one of the worst crimes. In case of false witness at Athens a man who had injured another intentionally or unintentionally by witnessing falsely against him could be sued by the injured party by a writ *γραφὴ ψευδομαρτυρίων*, conviction by which was penalized with a fine sufficiently large to cover the plaintiff's damages, to which cause it was largely applied. After second conviction in Athens the offender was no longer obliged to bear witness in courts against his will, since for a third conviction, which might, it must be re-

called, occur even when his false testimony had been given in good faith, he would suffer the drastic penalty of *ἀτιμία.*[84] But serious as this was, since not the state but the injured party alone had initiative in prosecution, and since after second conviction no man could be subpoenaed to act as witness, it would seem strange indeed to the Greeks to find this crime listed in a code which Philo is representing as the foundation of all law.

Still more surprising would it have seemed to Alexandrians, whose law was a modification of the Athenian law in the direction of greater leniency. According to Alexandrian law a suit might be initiated by the party injured by false witness, and as in Attic law, while the suit was pending the judgment on the original suit was suspended. Conviction for false witness was attended by a fine of one and one-half times the value of the original suit, which went not to the plaintiff but to the state.[85] So as there was no provision (in our records) for augmenting the penalty in later offenses, and as the injured party was still alone provided with initiative, Ptolemaic law would on this subject have made even less room than Attic law for the severities of Jewish procedure.

The Roman conception of false witness in Philo's time was certainly much stricter than either Greek or Ptolemaic practice. The Twelve Tables most explicitly de-

[84] Lipsius, *op. cit.*, pp. 777-784, 877; Vinogradoff, II, 196. Cf. *J.E.*, "Perjury"; *Shebvoth* 754. "No oath can be administered by a court to one who has once perjured himself, even though the litigant is willing to believe him on his oath; nor is his testimony to be admitted in evidence unless he undergoes the penalty of scourging or manifests such signs of contrition that the court is satisfied that he sincerely regrets his transgression."

[85] Graeca Halensis, *Dikaiomata*, pp. 48 ff. Cf. Taubenschlag, *Strafrecht*, p. 34; L. Wenger, "Neue Rechtsurkunden II," in *Kritische Vierteljahrschrift für Gesetzgebung und Rechtswissenschaft*, XV (1913), 349-354.

mand the death penalty,[86] and Polybius makes it clear that the penalty was enforced in his day at least in martial law.[87] Furthermore, the laws collected by Paulus, especially the *Lex Cornelia Testamentaria*, require that one who gives false testimony, whether explicitly, or by suppression of pertinent truth, just like one who tries to bribe a judge, is to be punished by deportation to an island if the offender is a member of the upper class, or by condemnation to the mines, or crucifixion, if he is of the lower class.[88] That is, false witness was considered by the Romans as a crime against the state, on the grounds of its being a perversion of public justice. It was on precisely this Roman ground that Philo based his third argument against false witness, when he pointed out that false witness was a lawless act (*παρανόμημα*), because as a result of it a man who should have won his case might lose it, and the court be thereby discredited.[89] When Philo returns to the subject for a few words in the *De Specialibus Legibus* it is on this same ground, the deception of the judge, and so the perversion of justice, that false witness is reprehended (§ 41). So much is this the case, he explains, that it is right to put false witness as a more serious crime than false accusation (a crime which was very severely treated by all ancient law), since a judge will always be on his guard against an accuser who will profit by a favorable decision, but is apt to be less critical of the testimony of a witness who is apparently disinterested in his testimony. The crime of false witness lies, we infer from this argument,

[86] *XII Tab.*, VIII, 23 (Bruns, *Fontes Iuris Romani Antiqui* [7th ed., 1919], p. 33): Gellius (20, 1, 53): "ex XII tab.—si nunc quoque—qui falsum testimonium dixisse convictus esset, e saxo Tarpeio deiceretur."

[87] VI, xxxvii, 9; cf. Mommsen, *Strafrecht*, p. 668, n. 1.

[88] Paulus, *Sent.*, V, xv, 5; xxv, 1. Cf. *Lex Dei, sive Mosaicarum et Romanarum Legum Collatio*, VIII (*Jurisprudentia Antejustiniana*, ed. Huschke-Seckel-Kuebler, 1927, II, ii, 358).

[89] *De Decal.*, 140.

not in saying what is untrue so much as in the perverting of public justice. His reasoning in this argument would thus have been valid in any Roman court of justice.

But Philo could not appeal simply to these Roman objections to false witness, for he is trying to keep his demonstration upon grounds that will appeal to the legal sense not only of Romans, but also of people thinking in terms of Graeco-Ptolemaic jurisprudence. So he justifies the making of false witness into a major crime also by the fourth argument: not only does false witness pervert public justice, it also always involves perjury. The perjury he has in mind is not direct, but indirect, for by his false witness the offender leads the judge, who is always under oath to give true judgment, into error, and causes him to break his oath. But the guilt of the broken oath is not the judge's, but that of the false witness, since it was he, and not the judge, who acted in bad faith. This argument also would have appealed to Romans, for while it was a custom common to both Greek and Roman law to swear judges,[90] it is the Roman Cicero who tells of a custom of his ancestors that litigants bear the oath of the judge in mind and ask nothing which is not in accord with it.[91] Further the guilt of the act would again appeal to a Roman in that Philo says that though it is the judge

[90] For Greek law see Lipsius, *Attisches Recht*, pp. 151 ff. At Gortyn the judge seems to have been sworn only in special cases: Ziebarth in Pauly-Wissowa, *Real-Encyc.*, V, 2080 ff. For Roman law; "Cui enim non est cognitum antiquos judices non aliter judicalem calculum accipisse, nisi prius sacramentum praestitissent, omnimodo sese cum veritate et legum observatione judicium esse disposituros." *C.J.C. Cod.*, III, i, 14, cf. Steinwenter in Pauly-Wissowa, *Real-Encyc.*, X, 1257. While I can find no evidence of swearing judges in Alexandria, it seems an obvious inference from Philo's words that such was the case there in both Jewish and gentile courts.

[91] Quum iurato sententia dicenda sit, meminerit deum se adhibere testum. . . . Itaque praeclarum a majoribus accepimus morem rogandi judicis, quae salva fide facere posset. *De Officiis*, III, x, 44.

who breaks his oath, he does so unintentionally, οὐ κατὰ γνώμην, and unwittingly, οὐκ εἰδώς, while the false witness offends knowingly and intentionally, ἐπιστήμῃ . . . καὶ ἐκ προνοίας. This seems a direct appeal for Roman sympathy since in contrast with Greek practice, which brought action for false witness whether the witness was aware he was saying falsehood or not, the *Lex Cornelia* defined false witness as always involving the fact that the testimony was given *sciens dolo malo*, and this aspect was always emphasized by the jurists.[92]

But the introduction of an argument against false witness based upon perjury seems the more surprising, not only because of its indirect application, but also because neither the Greeks nor the Romans regarded perjury in itself as a crime.[93] Both peoples thought of the matter as one lying between the perjurer and the gods he had insulted, interference in which by the state would have been deemed an impertinence. But in order to justify the Jewish view of perjury to Gentiles Philo here and elsewhere makes perjury a matter of ἀσέβεια,[94] the Greek term for that sort of sacrilege which was to be taken in hand and acted upon by the state.[95] And the reason for

[92] Paulus, *Sent.*, V, xxv, 1 and 10; Ulpian, *ap. Dig.*, XLVIII, x, 3, and 9, 3.

[93] For Greeks see Lipsius, *op. cit.*, p. 879; a parallel case seems to exist in the famous trial of Hygiaenon vs. Euripides, an action of Antidosis, in which incidentally Hygiaenon accused Euripides of ἀσέβεια because of his line (*Hipp.*, 612):

ἡ γλῶσσ' ὀμώμοχ', ἡ δὲ φρὴν ἀνώματος.

But apparently this was a moral reproach rather than a criminal accusation, since the charge was not pressed. See Arist., *Rhet.*, III, xv, 1416*a*, 28 ff., from Vinogradoff, *op. cit.*, II, 100. For Rome see M. Voigt, *Jus Naturale*, III, 240 ff., Mommsen, *Strafrecht*, p. 681, n. 2; cf. Cicero, *De Legibus*, II, ix, 22: "periurii poena divina exitium, humana dedecus"; Tacitus, *Annal.*, I, 73.

[94] *De Decal.*, 82-95; see especially 91: ὑπερβολὴ ἀσεβείας. Cf. *Spec. Legg.*, II, 1 ff., especially 27.

[95] Lipsius, *Attisches Recht*, pp. 359 ff.

the selection of ἀσέβεια as the ground for condemning perjury, and thereby false witness, is not far to seek. For in Ptolemaic Egypt ἀσέβεια had become conspicuously associated with the only type of oath-breaking which was actionable, namely the breaking of an oath sworn in the name of Ptolemy, the ὅρκος βασιλικός.[96] Since the king and the Hellenistic state were identical, an offense against the king was also a crime against the state. The crime of *lèse-majesté*, in this and other forms, was always, because of the religious character of the king, expressed by the term ἀσέβεια in Greek,[97] and was ordinarily classed as a ἁμάρτημα, that is as an offense which, like the Roman crime of false witness, involved guilty intent,[98] though on a third offense there seems some reason to suppose that unintentional or unconscious offenses were actionable. There were several forms of this ἀσέβεια in the sense of *lèse-majesté*, but one of the most important was failure deliberately to keep sacred the ὅρκος βασιλικός. Unfortunately no record of the penalty is preserved, though there was apparently a definitely specified one.[99] Our only clue to the penalty lies in the fact that this Hellenistic conception was taken over by the Romans to apply to oaths taken in the name of the emperor, though here our information in papyri is even more scanty than from the Ptolemaic period.[100] But for a slightly later period there is extant the law of Ulpian: "si quis iuraverit in re pecu-

[96] Taubenschlag, *Strafrecht*, pp. 49-51.

[97] Mommsen, *Strafrecht*, pp. 539 f.

[98] Taubenschlag, *op. cit.*, p. 51. The term ἁμάρτημα which in classic Greek indicated a fault which fell short of a crime because it was not prompted by criminal intent (see Arist., *Rhet.*, I, xiii, 16, 1374*b*, 7 ff.), became in Ptolemaic law the antitype of ἀγνοήματα, and indicated an intentional crime. Taubenschlag, *op. cit.*, pp. 7 f.

[99] Taubenschlag, *op. cit.*, p. 51, quotes from Dittenberger, *Orient. graeci Inscript.*, No. 48, in this connection, τοῖς ἐκ τῶν νόμων ἐπιτίμοις.

[100] Taubenschlag, *op. cit.*, p. 95. See references in note 2.

niaria per genium principis dare se non opertere et peieraverit vel dari sibi opertere, vel intra certum tempus iuraverit se soluturum nec solvit, imperator noster cum patre rescripsit fustibus eum castigandum dimitt[i deb]ere et ita ei superdici: *προπετῶς μὴ ὄμνυε.*"[101] It will be recalled as a striking coincidence that Philo says that while he prefers the death penalty for perjury, lenient people prescribed only scourging, from which I concluded that the penalty of scourging was the one Philo also had to assign in court.[102] These "lenient people" of Philo's were probably the Romans, or Jews who imitated them, for by both Greek and Roman law, in spite of the old Egyptian custom of assigning the death penalty for all perjury,[103] the only perjury which was actionable was that against the *ὅρκος βασιλικός*. But in Philo's day the only *ὅρκος βασιλικός* possible was that by the genius of the Roman emperor, whose sanctity would have been guarded by Roman courts, so that Philo must be referring to Romans in their penalizing of perjury against that oath. Ulpian's law increases the likelihood that such was the case, since his law was obviously based upon a Greek source and custom of presumably much earlier date, for the formula with which the executioner is to reproach the culprit while he scourges him is still preserved by Ulpian in the Greek language. The two bits of evidence together establish a strong probability that the Romans in Egypt in Philo's day treated the *ἀσέβεια* of perjury against the *ὅρκος βασιλικός* by scourging the offender, and suggest the further step that the Ptolemaic treatment had been the same, since the oath and its usages had been taken

[101] *Dig.*, XII, ii, 13, 6; from Mommsen, *Strafrecht*, p. 586, n. 5.

[102] See above, pp. 47 f.

[103] Such would be the natural conclusion from Isocrates, *Busiris*, 25, *δώσειν δίκην*; cf. Diodor., I, 77.

over by the Romans directly from Hellenistic custom,[104] and the Romans would hardly have deliberately made the penalty for *lèse-majesté* against the emperor less serious an offense than Greeks in Egypt had been accustomed to regard the same crime against the Ptolemies.

So in this fourth argument to demonstrate the criminal nature of false witness Philo seems to have carried over to apply to the violation of an oath taken by God the contemporary laws against the violation of the ὅρκος βασιλικός. Like that offense he calls this one a ἁμάρτημα, and since the malicious intent was present only in the mind of the false witness, though it was the judge's oath that was broken, the guilt of the act should fall solely upon the false witness. This transfer by Philo of the legal guilt of *lèse-majesté* to apply to violation of oaths taken by God is obviously very strained, because it ignores the essential distinction between the two oaths, namely that to violate the one was a crime against the state, while to violate the other was a religious offense only, with which the law always refused to deal. So while Philo's third argument would have been valid in any Roman court, his fourth, which apparently tried to catch the fancy of Greeks as well as Romans, was much weaker. The analogy of the two oaths would have been perfectly acceptable to a Jew, who regarded God as the real king of men, and so would naturally consider perjury as ἀσέβεια even more quickly when the oath had been taken in God's name than in the king's. But if the analogy would have seemed weak to Greek-thinking people, one must rather sympathize with Philo in his difficulties. False witness was condemned in his Decalogue, and so he was under obligations to demonstrate that it was one of the cardinal crimes known to

[104] Mommsen, *loc. cit.*, and Wenger in *Zeitschr. der Savigny Stiftung*, Rom. Abt., XXIII, 271.

man. It was easy for him to justify the view that the giving of witness was a sacred act to Romans, who themselves had so high a regard for truth that they called the proper witness *religiosus testis*.[105] But to demonstrate that truthtelling was a cardinal virtue, even in court, to people with a Greek point of view, and from Greek postulates, was a task too great for even Philo to accomplish successfully.

Of the punishment for false witness we cannot be sure. Perjury itself, as we have seen, though Philo preferred the death penalty, was probably punished by scourging; and since he has represented the guilt of false witness as consisting in the perjury involved, it may be correct to surmise that he intended the same penalty for both offenses. But of this it is impossible to be certain, for it is just as likely that the Jews may have used the scriptural penalty in such cases,[106] namely that the false witness suffer the identical misfortune he was intending to bring upon the innocent defendant. So if the offender had witnessed falsely against a man in a capital trial he should himself be killed; "and thine eyes shall have no pity; life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot," a provision which could easily have been expanded to apply to trials involving scourging, or fines, though it must have been altered somewhat to cover poor men who had not money to pay fines equivalent to those they tried to force upon their enemy by false witness. But this is pure speculation. Actually, for all Philo's elaborate defense of the seriousness of false witness as a crime, he has told us nothing of how it would have been treated in a Jewish court.

One important conclusion can, however, be drawn from

[105] Cicero, *In Vatinium*, 1. [106] Deut. 19. 16-21.

the discussion. It appears that Jews were accustomed to swear their judges, but not the witnesses.[107]

The use to which Philo would put witnesses is notable. In legal procedure as he knows it, judgment is preferably given on the basis of λόγοι and γράμματα, speeches of the litigants and the documents they produce. Only when these two are lacking do litigants resort (καταφεύγουσιν) to witnesses, whose testimony will be the basis of the judgment. (*De Decal.*, 140.) This is a Greek distinction, and is significant. In Greece each testimony was written out and deposited as a document with the court, but the γράμματα proper in any case were contracts, wills, account books, letters, and the like, and did not include documents written up especially for use in the trial, such as the depositions of witnesses.[108] This distinction in Greek procedure corresponded to a conservatism on the part of Jews to trust to witnesses. For example, the tradition in the Mishnah shows itself extremely timid about witnesses, requires always two in any criminal case, and indeed hedges the use of evidence with so many restrictions that Professor Moore thinks its discussion is too academic to reflect actual usage, since conviction is deliberately made almost an impossibility.[109] But I can see no reason for not assuming that Philo has described the usage in the Jewish courts he knew. What he says does not imply that witnesses were not freely used, but only

[107] Witnesses were not always sworn by the Greeks; see Lipsius, *Attisches Recht*, p. 884; R. J. Bonner, *Evidence in Athenian Courts*, 1905, p. 76; *ibid.*, *Lawyers and Litigants in Ancient Athens*, p. 53; but they were sworn by Greeks in Alexandria, *Dikaimota*, ll. 224 ff. They seem to have been sworn in Rome, see Roby, *Roman Private Law*, II, 408, Cicero, *Pro Roscio Commoedo*, XV, 45.

[108] R. J. Bonner, *Evidence in Athenian Courts*, p. 61. Cf. Lipsius, *Attisches Recht*, pp. 869-888, and Wayte's article "Martyria" in Smith's *Dict. of Class. Antiq.* (2d ed.), II, 126 ff.

[109] G. F. Moore, *Judaism*, II, 184 ff. Cf. I. M. Rabbinowitz, *Legislation criminelle du Talmud*, Paris, 1876.

that the courts much preferred "documentary" proof to the deposition of witnesses, a fact which is quite intelligible in actions where the witnesses were not sworn. In trials where the responsibility for integrity was completely put upon the judge, and the witness was not sworn, the judge would naturally have been suspicious of the witnesses, and preferred documents if these could possibly have been produced. From another passage the use of the oath in Jewish trials is further illustrated (§ 40):

> One who denies an accusation and tries to fix it upon another person brings a false accusation and elaborates devices by which the false accusation may appear to be reasonable; and every false accuser is a perjured man who recks little of piety. For when just evidence (ἔλεγχοι) is lacking, men have recourse to the so-called inartificial proof (ἄτεχνον πίστιν), that is, proof by oaths, thinking that by calling upon God he may make his hearers believe him.

Just before the words quoted, Philo associates the connection of false witness and perjury with a passage in Leviticus (19. 11, 12), where, in a series of legal precepts, a command against lying and false accusation is followed immediately by another against swearing falsely in God's name. It may be that Philo was himself inspired to connect perjury and false witness by the juxtaposition of the two commandments in the Torah, but I do not think so. Out of a large list of commandments Philo has selected these two artificially to make a couplet, and his motive seems rather to lie in a desire to account for actual Jewish procedure than in exegetical whimsicality. Philo describes the use of oaths in trials as ἄτεχνος πίστις; that is, oaths are a sort of evidence which is not created by artistry, a conception which Heinemann at the passage rightly connects with Aristotle's *Rhetoric*, I, 15. But it must be noticed that Philo's use of the term is not at all

like that of Aristotle, for according to Aristotle the quotation of laws, the calling of witnesses, the producing of documentary evidence, torture, and oaths, are all "inartistic" because they are not the creation of the rhetorician's art. But Philo contrasts oaths, which are ἄτεχνος πίστις, with proper evidence, ἔλεγχοι δίκαιοι, which by plain inference he understood to be τεχνικὸς πίστις, though both are specifically classed as ἄτεχνος πίστις by Aristotle. But if Philo's use of terminology does not follow Aristotelian usage his picture of procedure is perfectly clear. Lacking evidence to substantiate his accusation the accuser was permitted to appeal to an ordeal by oath, one trace of which has already appeared in the use of the θεῖον δικαστήριον to clear receivers who, through no fault of their own, were unable to return a deposit.[110] Apparently this ordeal was a very important part of Jewish procedure, and while its use was prompted by the great reverence with which Jews traditionally regarded oaths taken by God, its abuse was prevented by the extreme penalties Jewish piety demanded for perjury.

With this Philo has finished his discussion of false witness in itself. As he goes on to the "derivative" laws it is surprising to find the first one to be the law against divination and diviners. He makes the connection by describing soothsayers as a sort of false prophets, who represent themselves falsely as speaking under divine inspiration (§§ 48-52). Heinemann at the passage says that Philo's word ψευδοπροφήτης appears nowhere (*findet sich nirgends*) in the Septuagint, and that there is nothing to which it could correspond in the passages (Deuteronomy 13. 2-5; 18. 20-22) which he thinks Philo had in mind in writing this section. Certainly the word does not appear in those passages in our texts, but it is used in the

[110] See above, pp. 167 ff.

Septuagint several times, at Jeremiah 6. 13; 33 (26). 7, 8, 11, 16; 34 (27). 7; 35 (28). 1; 36 (29). 8, 9; Zechariah 13. 2. In each of these cases it is a translation of the Hebrew נָבִיא, the same word as that used and translated *προφήτης* in both passages referred to by Heinemann in Deuteronomy. For this same word is throughout the Septuagint translated with no consistency now as *προφήτης* and now *ψευδοπροφήτης*: for example in Ezekiel 13. 16, and many other passages, one would have expected *ψευδοπροφήτης*, and finds instead *προφήτης*, as precisely here in these passages in Deuteronomy. It may be that in Philo's text *ψευδοπροφήτης* was used there. But even though the word itself did not stand in these passages, it was a familiar usage in Hellenistic Judaism for the word *ψευδοπροφήτης* to be used directly as a synonym for pagan diviners, who would properly have been called *προφῆται* by their followers. The term was, of course, also used in Hellenistic Judaism of prophets who had erred in their prognostication, and who hence must have been false in claiming that they spoke with divine afflatus, as Philo explains here, and as the early Christians used the term.[111] But the use of *ψευδοπροφήτης* with reference to soothsayers and diviners is clear in two passages in Jeremiah, and this meaning, too, survived in early Christian literature.[112] Philo clearly feels very strongly against these practitioners, but again gives us no hint as to what procedure of penalty he would have used, for since he is writing for readers who regarded soothsayers and diviners as

[111] See Matt. 7. 15, Luke 6. 26 (where the meaning is uncertain). Out of this meaning grew the early Christian use of the term for one who leads into heresy: II Pet. 2. 1; I John 4. 1; *Shep. Hermas*, Mand. xi, 1 ff., *Didache* xi, 5 ff.

[112] Jeremiah 34 (27). 7: *καὶ ὑμεῖς μὴ ἀκούετε τῶν ψευδοπροφητῶν ὑμῶν καὶ τῶν μαντευομένων ὑμῖν καὶ τῶν ἐνυπνιζομένων ὑμῖν καὶ τῶν οἰωνισμάτων ὑμῶν καὶ τῶν φαρμακῶν ὑμῶν, κτλ.*; 36 (29), 8, 9. See Acts 13. 6: *τινὰ μάγον ψευδοπροφήτην*; Rev. 16. 13; 19. 20.

inevitable, or highly desirable, or necessary members of society, he could not call for action against them, and must content himself with a moral protest. Whether Jews actually did prosecute soothsayers or not cannot be determined, but seems to me quite unlikely.[113] When Philo had a penalty for such people, as in the case of magicians,[114] he did not fear to speak out about it, though since he was on common ground with the Romans and Greeks there, but stands alone here, his not mentioning a penalty cannot be taken as proof positive that Jews tolerated the practice of divination among themselves.

The subject of false witness now offers to Philo an opportunity to go on and discuss laws of evidence and court procedure in general. As introduction he gives as excellent a paragraph on the inadequacy of a single witness as could be found in any legal literature:[115]

> But excellent indeed is that further command that the evidence of a single witness should not be admitted.[116] First because he might have seen or heard mistakenly, or may have disregarded something and been deceived, for from innumerable causes numberless false opinions are constantly being arrived at. Second because it is most unjust to use a single witness against many defendants, or even against a single defendant, against many because they are more credible than one, and against one because the witness does not surpass the defendant in number, and equality is distinctly a different thing from predominance. For why is a witness testifying against another person more credible than the accused when he testifies in his own behalf? When, then, evidence is lacking, or there is no predominating weight on either side, it would seem best to withhold judgment.[117]

[113] See above, p. 37. [114] See above, p. 109.

[115] §§ 53, 54. Editors have mistakenly kept the beginning of the section called *τὰ πρὸς δικαστήν* at § 55, although that discussion clearly begins here at § 53.

[116] Num. 35.30; Deut. 17.6; 19.15.

[117] Heinemann points out here that the idea is Stoic that in the absence of adequate evidence one should withhold judgment.

This reasoning is all the more convincing when it is recalled that witnesses were used in Jewish courts, as in ancient courts in general, only when no other type of evidence was forthcoming.[118]

With this introduction Philo goes on to a discussion of the judge's character and duties which is as inherently interesting as it is important for the light it throws on Jewish procedure, and so I will quote it entire.

As contrasted with those who use other laws, the Law considers that every adherent of the sacred polity (*πολιτεία*) of Moses ought to have no share in any unreasoning passion, or in any evil, and especially should this be true of those who have been chosen by lot or by election to act as judges. For it would be absurd that those men should be polluted with sins (*ἁμαρτήματα*) who are deemed worthy of dispensing justice to others, men who ought themselves to be copies of the works of nature, as though from an original sketch, for imitation (by others). For as the power (*δύναμις*) of fire, which dispenses warmth to whatever it touches, had first itself to be constituted as heat, and as, on the contrary, the power of snow, by itself being cold, can also cool other things, so the judge must similarly be filled with unimpeachable justice, if he is to irrigate (*ἐπάρδειν*) with justice those whom he meets, so that a wholesome river will bear down from a sweet spring upon those who thirst for the fine order of law (*τοῖς διψῶσιν εὐνομίας*).[119] [§§ 55, 56.]

It will be well to interrupt the discussion of Philo occasionally for comments. Philo has here not the Jewish judge alone in mind in what he is saying, for it is highly probable from his remarks in another connection that Jews never selected their judges, like the Greeks, by lot.[120] His discussion of the ideal judge is throughout Greek in

[118] See above, p. 184.

[119] Lucian uses the same figure of a man whose soul is irrigated with good health stored up through exercise. *Anach.*, 26.

[120] See *Spec. Legg.*, IV, 157 ff. But I cannot see that Philo is here "ungenau" as Heinemann says *ad loc.* For Greek methods of selecting judges see Thalheim in Pauly-Wissowa, *Real-Encyc.*, V, 568, ll. 50 ff. Probably Philo in both passages has the Alexandrian custom in mind.

inspiration, though applied to the Jewish judge, and has probably been worked over from some current Greek treatise on the judge. For Philo begins his exposition in terms of a philosophy which I have recently demonstrated to have been the political philosophy of rulership of the Hellenistic Age.[121] According to that philosophy, which drew much from Socrates, Plato, and Aristotle, as well as from the Stoics later, but which seems to have been a tenet of Pythagoreanism, the true ruler is νόμος ἔμψυχος, an incarnation of Divine Law, or of the Law of Nature, which is the Divine Logos in the universe. The ruler's business is to be a mediator between God and men by being a conductor of this divine principle of rulership to humanity. Into him flows the divine Nomos-Logos, and out of him flows in turn a great stream of this same power, which is an effulgence of ideal justice and God's Logos.[122] The king is, to change the figure, a copy of God, whom in turn his subjects copy,[123] so that "in the case of ordinary men, if they sin, their most holy purification is to make themselves like the ruler, whether it be law or the king (or, Philo would say, the judge) who orders affairs where they are."[124] The conception was especially applied to the king, who was ruler *par excellence*. But the last quotation shows that it was carried over and applied to other rulers as well, who, as they had responsibility of political power, shared or should share in this divine empowering for rulership. Particularly pat here comes the fact that in discussing the ideal judge Aristotle says that going to a judge should be like going to Justice

[121] See my "The Political Philosophy of Hellenistic Kingship" in *Yale Classical Studies*, I, 53 ff.

[122] Plutarch, *Moralia*, V, 11 ff. (ed. Bernhard): *A Discourse to an Unlearned Prince*, 3.

[123] From the Pseudo-Aristot. *Letter to Alexander*. See especially 1420*b*, 14.

[124] Ecphantus, quoted in my essay named above, p. 77.

itself, since the judge is meant to be, in a sense, justice incarnate (οἷον δίκαιον ἔμψυχον).[125] So Philo's judge is one who, being himself full of justice, is a model for others to copy, but also is a source of radiating justice by which the souls of others are irrigated. The same conception is generalized, though with the judge still in mind, in §§ 140, 141 below, where the perfect man is to be a fountain from whom wisdom and justice flow out in abundant streams. All are to come to him to drink, and those reticent about coming are to be visited and have the stream poured into their ears until the channels of the soul are filled with it, since the chief delight of life is to have one's soul thus entirely filled with justice.[126]

The king's or ruler's part in this process was to keep himself pure of all meanness and sin, and to steel himself in the virtues, else instead of representing Natural Law to his people he would be the chief means of its perversion. So Philo goes on to urge the judge:

> Now this will be effected if the one who undertakes the office of judge fancies that at the same time he is both judging and being judged, and if, when he takes up the pebble (by which he registers his decision), he take up along with it insight (σύνεσιν), so that he be not deceived, and justice, so that he may award to each of the contestants according to his deserts, and courage, so that in the face of supplication and lamentation he will still be inflexible in penalizing the condemned. The man who cultivates these virtues would naturally be regarded as a public benefactor (κοινὸς εὐεργέτης), like a good pilot who completely calms the storms of daily life (τῶν πραγμάτων) for the sake of the salvation and security (σωτηρίας καὶ ἀσφαλείας) of those who trust their affairs to him. [§§ 57, 58.]

[125] *Eth. Nic.*, V, 1132*a*, 20 ff.

[126] Philo's conception of δικαιοσύνη, while quite of a piece with the ideas of antiquity, especially of the Hellenistic age, has by no means been adequately expounded, and throws a flood of light upon the aspirations of Paul. It is an exposition to which I hope soon to be able to devote myself.

So closely is Philo here following Greek political theory that one wonders whether the pebble with which the judge registers his decision was really used in Jewish courts, or has only slipped in here from the Greek source which Philo is following, as did the reference to the judge's being selected by lot. All that Philo says is still in perfect harmony with the Hellenistic political philosophy. For in order that the divine Nomos-Logos might pour into the ruler, he must have had a properly receptive attitude, an attitude which is chiefly expressed by his attitude toward his subjects, precisely as in the Christian (and Philonic) theories of salvation there was always that double aspect, the divine gift of the Spirit being conditioned by the attitude of the recipient, not only toward God, but toward men. But a ruler who had received the gift became, in terms of the current philosophy, a *σωτήρ*, a *κοινὸς εὐεργέτης*, and a good pilot who quells the storms of life and brings his subjects *σωτηρία*, if they properly trust themselves to him.

May we believe Philo that this conception of the judge was current in Jewish courts in Alexandria?[127] It is a point which cannot be demonstrated, but I see no reason for calling his statement in question. Once one has grasped the, to us, strange idea of *νόμος ἔμψυχος*, or *δίκαιον ἔμψυχον*, it presents no particular difficulty, and when coupled with moral exhortation, is a perfectly workable ideal for a king or judge. In a Jewish courtroom, which had for decades if not centuries been environed with such a political philosophy, and which had been as sensitive to Greek and Roman legal practices as Philo shows Jewish practice to have been, there is no reason to suppose that this explanation of the judge's

[127] See article, "Judges," *J.E.*, VII, 376, for high qualifications, attitude, etc., according to rabbinical law.

office could not have been taken over with the rest. But since a Greek document of some sort has clearly been behind the composition of this passage, we may be even more confident in asserting that this philosophy was applied by at least some of Philo's generation to the Greek courts. What Philo says amounts to this: if Greek judges must be δίκαιον ἔμψυχον by their rigid morality, much more must Jewish judges be so, who, representing a much higher legal system than the Greeks, should all the more be saviors of their people. The conclusion seems to me unavoidable that we have here a familiar bit of Hellenistic political philosophy to express the true function of the judge and his court in society.

Having thus suggested his philosophy of the function and nature of the judge, Philo goes on to harmonize Greek rules of evidence and procedure with Jewish law, and immediately there appears little doubt but that he is speaking from court experience.

In the first place the law bids the judge "not to admit idle hearing."[128] And what does that mean? My good man, it is saying, keep your ears clean; and they will be clean if they are constantly being washed by a stream of excellent words,[129] and if they never admit the long speeches, idle, and worthy only of being rejected and ridiculed, which story writers, comedians, and inventors of absurdities indulge in as they magnify matters of no importance into pretentiousness. And a second conclusion harmonious with the first is also clearly to be deduced from the command not to admit idle hearing: it means that he who heeds hearsay evidence is paying heed idly and unintelligently. Why? Because eyes come into contact with the very things that happen, in a

[128] Exod. 23. 1: *οὐ παραδέξῃ ἀκοὴν ματαίαν.*

[129] See below, pp. 198 ff. This idea of being flooded with a stream of words is reminiscent of a line of Euripides quoted by Plutarch, *De Garrulitate*, 1 (502*c*), Fragm. 891 (Nauck):

σοφοὺς ἐπαντλῶν ἀνδρὶ μὴ σοφῷ λόγους.

Philo has just above (§ 47) quoted two lines from Euripides' lost tragedy of Antiope. Is this line from the same play?

sense catching hold of the facts and apprehending them in their totality; since eyes work by the medium of light, by which all things are illuminated and exposed. But ears, as one of the ancients[130] not without discernment remarked, are less reliable than eyes, for they do not come into contact with the facts, but are distracted by words which, as interpreters of facts, are not always designed to give a true impression. Wherefore some of the Greek lawgivers who copied from the most holy tablets of Moses seem to have made an excellent regulation in forbidding hearsay witness, for it is right to accept as reliable what someone has seen, but what one has heard is by no means certain. [§§ 59-61.]

Philo here takes the command *οὐ παραδέξῃ ἀκοὴν ματαίαν* and interprets it in two ways, first not to listen to sophistry, by which it seems most evident that he is referring to the speeches of advocates in court, and second not to accept hearsay evidence. The first interpretation he has really forced upon the passage because he was so thoroughly aware from experience how carefully a judge must be on his guard if he is not to have his judgment dulled by specious eloquence or argument. It was hardly a law of procedure which the court could publish to guide litigants, but it was a bit of the business of a judge which Philo was too close to reality to omit mentioning. The second interpretation was unquestionably a formal law of evidence in the court, and in support of it he quotes not only Scripture but Heraclitus[131] and Greek law. In Athens hearsay evidence was permitted only when the person whence the rumor had come had died, and so could not himself appear as witness.[132] The rabbinical tradition also rejected all hearsay evidence.[133]

[130] See following note.

[131] Heinemann, *ad loc.*, has identified the "ancient" as Heraclitus: Herodotus, I, 8; Polybius, XII, xxvii, 1; R. v. Scala, *Studien des Polybius*, I, 88.

[132] Lipsius, *op. cit.*, p. 886. The same law, or something similar, must have been observed in Alexandria.

[133] Ritter, *op. cit.*, p. 104, n. 1, and article, "Evidence," *J.E.*, V.

Philo continues:

The second precept for the judge is that he take no gifts;[134] for "gifts," says the Law, "blind seeing eyes, pervert justice,[135] and prevent the mind from travelling straight ahead on a smooth road. For to accept "gifts" for assisting in an act of injustice is the conduct of a thoroughly depraved person, and to do so even for assisting justice is the sort of thing that people do who are half wicked. For some high officials are half villains, mixtures of justice and injustice,[136] who, though they have been appointed to office to protect people who are being wronged from men who would wrong them, still do not like to write a judgement gratis even for those who deserve the judgement, but declare their decisions on a monetary and purchasable basis. If any one criticizes them for it they assert that they have not perverted justice, since those who should have lost actually did lose, and those who should have prevailed won their cases. A wretched defence! For the good judge ought to manifest two qualities; he should exercise judgement strictly in accord with the law, and he should be incorruptible. But the man who for "gifts" acts as "umpire of justice"[137] has, unwittingly, defiled something which is by nature beautiful. [§§ 62-64.]

Philo's argument is here closely following both Greek and Jewish traditions. The rabbinical tradition laid down the same law, that "even for pronouncing the innocent innocent, and the guilty guilty" no fee could be charged,[138] while Josephus demands the death penalty for any judge

[134] Δῶρα seems here to mean well-intentioned gifts as well as its usual meaning of "bribes."

[135] Exod. 23.8. Mangey and Heinemann are probably quite right in their suspicion that Philo's *τὰ δίκαια* should be, like the Septuagint, *ῥήματα δίκαια*.

[136] Εὐπάρυφοί *τινες ἡμιμόχθηροι, δικαιάδικοι.* Δικαιάδικοι seems a word of Philo's coining from Plato, *Rep.*, I, 352*c*, from which *ἡμιμόχθηροι* also comes.

[137] Βραβευτὴς *τοῦ δικαίου*, Heinemann points out, is a phrase from Aristotle's *Rhetoric*, I, 15, 1376*b*, 20 ff. The argument of Philo seems quite reminiscent of this passage. Both are arguing from the "nature" of justice.

[138] Ritter, *Philo und die Halacha*, p. 104, n. 2; Heinemann, *ad loc.*, n. 4. Prov. 17.23.

who accepts bribes.[139] This penalty has no justification in the Torah, but has a clear precedent in Greek practice, and indeed if this penalty of Josephus' were added to Philo's passage the whole would very closely reproduce an argument of Plato's in the *Laws*.[140] Philo has taken a Greek defense of a Greek practice to defend a similar practice in Judaism. But these principles are used to denounce the Roman courts (for it has been seen that εὐπάρυφοι is a euphemism of Philo's for Roman dignitaries[141]) as presided over by officers who are particularly amenable to, and grasping of, bribes. The reference is purposely not so pointed as to give grounds for action to the officials criticized, but Philo's readers must clearly have understood who it was that he had in mind.

Philo continues:

> And he commits also two other sins (in taking "gifts"): first he is accustoming himself to be a lover of money, a state of mind which impels one to the most extreme lawlessness; second by charging a fee for justice he injures the man whom he ought to benefit. Wherefore it was most illuminating that Moses enjoined that justice be pursued justly,[142] whereby he implies that it is possible to do so unjustly if the umpires of justice act for gifts, not only in the courts but everywhere,[143] and, I would almost say, in every aspect of life. For example some one may restore a deposit of small value which he has been guarding, with the purpose rather of deceiving than profiting the man who gets it back, in order that the fidelity in small matters may serve as a bait with which to angle a larger trust. This is nothing else than doing what is just unjustly; for the restoration of the other's property

[139] *Cont. Ap.*, II, 27 (207).

[140] 955*c*, *d*: *τοὺς τῇ πατρίδι διακονοῦντάς τι δώρων χωρὶς χρὴ διακονεῖν, πρόφασιν δ' εἶναι μηδεμίαν μηδὲ λόγον ἐπαινούμενον, ὡς ἐπ' ἀγαθοῖς μὲν δεῖ δέχεσθαι δῶρα, ἐπὶ δὲ φλαύροις οὔ· τὸ γὰρ γνῶναι καὶ γνόντα καρτερεῖν οὐκ εὐπετές, ἀκούοντα δὲ ἀσφαλέστατον πείθεσθαι τῷ νόμῳ, μηδὲν ἐπὶ δώροισιν διακονεῖν. ὁ δὲ μὴ πειθόμενος ἁπλῶς τεθνάτω ἁλοὺς τῇ δίκῃ.*

[141] See above, p. 74.

[142] Deut. 16.20 (Septuagint).

[143] Some MSS add "on land and sea."

was just, but it was not justly done, inasmuch as it was done in pursuit of greater plunder. [§§ 65-67.]

Heinemann has pointed out that this is a familiar bit of ethical casuistry from the times, and one to which Philo at least twice again returns.[144] But Philo's argument here takes an original form because he is forcing the usual argument, which only meant that no course of action was always, and under all conditions, right, upon a text of the Torah which said that justice must be done justly. Philo's contemporaries would have regarded the scriptural statement, especially with the negative inference which Philo draws, as a contradiction in terms. One is simply to do justice, they would have answered, and it is absurd to say that one can do justice unjustly. As Seneca said, "actio recta non erit, nisi recta fuerit voluntas."[145] This distinction Heinemann seems to have missed, as well as the fact that in none of the authors he adduces is a hypothetical case given of the conduct in question which is really similar to the case given by Philo. Philo's reasoning here seems thoroughly specious by ancient and modern criteria alike, and is so because he tries too cleverly to fit the Greek idea back into a scriptural phrase which essentially means something different. Still it is clear what Philo intends to be the attitude of the judge: he is to do what is just from the highest motives, and with the best intentions.

But the opportunity for a digression is too alluring at this point for one of Philo's temperament to resist. One paragraph he must devote to the general meaning of

[144] See his note here (*Werke*, p. 266, n. 2) and also Cohn's note in *Werke* to *De Cherub.*, 14 ff., and Heinemann's note to *De Plant.*, 101 ff. I am unable to see, however, why both these scholars distinguish this reasoning as Stoic when they themselves trace it back to Socrates and Plato.

[145] *Epist.*, XCV, 57, Arnim, *Fragm. Stoic. Vet.*, III. 517.

falsity and truth, and the proper relation of the judge to truth from this general point of view:

The most important cause of such sins is the environment of falsity in which one lives, and which from birth and infancy nurses, mothers, and the rest of the crowd of domestics, free born and slave, by their actions and conversations constantly inculcate into him along with his very food. They fit and join this falsity to his soul as if it were naturally a necessary part thereof, when rather if falsity had been naturally congenital in the soul it should have been cut out from it by a training in beautiful things.[146] But what in life is so beautiful as truth? "Truth" which the all-wise (Moses?) engraved upon the most sacred part of the vesture of the chief priest,[147] there where is the leading part of the soul, wishing to adorn him with the most beautiful and distinguished of ornaments. And he put a kindred power alongside "Truth" which he called "Revelation," as figures of our two kinds of logos, the inward logos and the processional logos.[148] For the processional logos needs the power of revelation, to make known to our neighbors the thoughts invisible in each of us, while the inward logos needs to partake of truth for the perfection of that life and action by which the road to happiness is discovered. [§§ 68, 69.]

[146] The idea that bad environment is the cause of human sinfulness may have been originally Pythagorean, for it appears in Diotogenes, *ap.* Stobaeus, IV, i, 96 (ed. Wachsmuth et Heinse, IV, 36), and Ecphantus, *ap. Ibid.*, IV, vii, 65 (IV, 277). See my "Political Philosophy of Hellenistic Kingship" in *Yale Classical Studies*, I, 89. Also Iamblichus, *Vit. Porph.*, § 213: . . . καὶ μετὰ ταῦτα τρέφειν τε καὶ παιδεύειν μετὰ πάσης ὀλιγωρίας. Ταύτην γὰρ εἶναι τὴν ἰσχυροτάτην καὶ σαφεστάτην αἰτίαν τῆς τῶν πολλῶν ἀνθρώπων κακίας τε καὶ φαυλότητος. κτλ. The conception is found in early Christianity, though of course it had later to be rejected for the doctrine of original sin, in spite of its persistence in Pelagianism. See Justin Martyr, *Apol.*, I, lxi, 10, and my *The Theology of Justin Martyr*, p. 228.

[147] Exod. 28. 30.

[148] The Stoics developed an aspect of Platonic and Aristotelian philosophy into the conception that λόγος προφορικός was the externalization of the λόγος ἐνδιάθετος, that is that our speech is an outflowing of our reason-stuff; and they consequently taught rhetoric as a subject inherently connected with logic. The two logoi were much played with in antiquity. See Max Heinze, *Lehre vom Logos*, pp. 140 ff., A. Aall, *Geschichte der Logosidee*, I, 139 ff.; Philo, *Vit. Mos.*, II, 127, with Badt's note in *Werke, ad loc.*, and Heinze, p. 231.

That is, Philo's ideal judge, so far as he pronounces judgment on the basis of examination of evidence, must train his whole character in the way of Truth, first so that he may be able to think accurately, then that he may be able to express himself in the most unequivocal and clear-cut way. His rulings must be well worded so as to be an unambiguous exposition of the correct decision at which he has arrived. This is not a power which men normally have without practice, for all their early training tends to distort the sense of truth and truth-telling. So the ideal judge will try to train his rational powers into habits of accuracy. But Philo distinguishes, in a thoroughly Stoic way, two aspects of the reasoning process, first the inward ratiocination, second the expression of thought in speech, and this time he is more fortunate in the scriptural text he finds upon which to hang the Stoic idea. For the Book of Exodus describes a sort of sack or pouch which was to be strapped across the breast of the high priest, containing the Urim and Thummim, two objects which, since the whole was a contraption for "judgment," were probably lots, by shaking out one or the other of which an inquirer could get an oracular "yes" or "no" judgment upon some question he might ask. But the words Urim and Thummim, themselves probably a later interpretation, mean "lights" and "perfections," and so the ancient text is translated by the Septuagint: *καὶ ἐπιθήσεις ἐπὶ τὸ λογεῖον τῆς κρίσεως τὴν δήλωσιν καὶ τὴν ἀλήθειαν*, which would mean to any Greek, "And thou shalt put upon the breastplate of judgment Revelation and Truth."[149] It was but a short Philonic step from *λογεῖον* to *λόγος*, and since clarity and accuracy are obviously the two chief virtues of thought and speech, and both are in the text

[149] Cf. *Vit. Mos.*, II, 127 f., and *Spec. Legg.*, I, 88 f. See Kennedy in Hastings, *Dict. Bibl.*, IV, 838 ff.

itself connected with the idea of judgment, it was easy for Philo to conclude that a judge should, by scriptural precept, train himself in logic and rhetoric. Clearly Philo is only trying to find scriptural warrant for a recognized part of the qualifications of an ideal judge according to Greek standards of his day. The passage is an excellent illustration of my contention that when Philo's reasoning becomes allegorical the cause is not the fancifulness of Philo, but his sense of obligation to fit back into Scripture an idea which he had got from his environment, and which is essentially foreign to anything he can find in the Bible.

Further, Philo goes on to say, a judge must train himself in impartiality by habituating himself to viewing not the persons but the facts which come before him. Philo says:

> The third injunction for the judge is that he investigate the facts rather than the litigants, and attempt by all means to keep his mind from forming impressions of the contestants. What knowledge and memory he may have (of the contestants) as his relatives, friends, or fellow citizens, or as strangers, enemies, or foreigners, this he must ignore and forget, that neither friendliness nor hatred may overcast his will to justice. For otherwise he will certainly fall like a blind man who walks without a staff and who has no guides from whom he can safely inquire the way. Consequently the good judge ought to hide from himself who the people are that he is judging, and scrutinize the naked and undisguised nature of the facts, with a view to judging not according to opinion but to the truth. And he should bear in mind that "Judgment is of God,"[150] while the judge is steward of judgment. As a steward he can dispense with the things of his Lord, for he has received from (God who is) the Best of all things the very best of all those deposits which are given to men. [§§ 70, 71.]

Two important ideas appear here. The first is that the judge ought to disregard personal predilections in giving

[150] Deut. 1. 17.

judgment, a statement possibly based upon the Jewish command not to respect persons, and always prominent in Jewish discussions of justice,[151] but which seems closer to the reasoning of the Greeks as represented by Aristotle, who, while he deplored the fact, recognized that judges were often influenced by personal considerations, and so wanted the law to give as little latitude to the judge as possible, and restrict his activities solely to passing upon the facts in a particular case.[152] Philo's passage also recalls the instructions for showing impartiality which Thutmose III gave his viziers: "It is an abomination of the god to show partiality. This is the teaching: Thou shalt act alike to all, shalt regard him who is known to thee like him who is unknown to thee," etc. The vizier is to judge justly, and send forth two men (the two parties to the suit) satisfied.[153] It may be that this Egyptian tradition was still living and influenced Philo's remarks. The second conception, that justice is an entity deposited by God with the judge, might have been inspired in Philo's mind by either Jewish or Greek tradition. According to the old Jewish teaching there was a Spirit of Wisdom, which was also the Spirit of Justice, which was given by God to the true King to enable him to give right judgments. The outstanding instance is the case of Solomon who prayed for this particular gift, and so got his famous power of judgment.[154] But the same

[151] Deut. 1. 17; 16. 19; cf. Ritter, *op cit.*, p. 104, n. 3.

[152] *Rhetoric*, I, i, 1354*b*, 4-16.

[153] J. H. Breasted, *Ancient Records of Egypt*, II, 268 ff., 281 f.; see also the instructions to the herald, *ibid.*, pp. 298 f.

[154] I Kings 3. 7 ff., 10. 9; cf. II Chron. 9. 8. The same royal prerogatives were in less elaborate form also traditional of David: II Sam. 8. 15, a power illustrated in the judgment of Mephibosheth in *ibid.*, 9. See also Ps. 72. 1 f., Prov. 21. 1 ff. I am publishing in this year's issue of the *Journal of Biblical Literature* an article, "Kingship in Early Israel," in which I go into this matter in detail.

Spirit of Justice could be given to any man in the judge's office.[155] Philo does not use any of this biblical material, however, and is content with mentioning only the one verse that "Judgment is of God," because on this point the Greek and Jew had precisely the same theory. For, as has been pointed out, the Greek thought of the judge, as well as the king, as the incarnation of justice.[156] Philo's figure for this divine entity which is intrusted to a human being in charge of other humans is here the same as that in Jesus' parable of the talents, only that here the bad guardian of the deposit is one not who hoards it but who dissipates it in gratifying his own whims.[157] But it is notable that Philo does not go on to quote the rest of the biblical verse which he is discussing. If judgment is God's, the text concludes, "the cause which is too hard for you ye shall bring unto me, and I will hear it." Philo is, of course, familiar with trial by ordeal, especially by the ordeal of oath,[158] but when summing up the duties of the judge, who would probably hand over such a trial to the

[155] Isa. 28.6. Cf. Isa. 11.2; 32.1 ff., 15, 16; 42.1 ff.; Prov. 2.9; 29.26. The "Spirit of the Lord" which comes upon the Servant in the famous "Messianic" passage Isa. 61.1 ff., is also throughout familiarly royal.

[156] It is interesting for my theory of "conflicts" as lying behind Philo's allegory and figurative discussion that where there is no conflict, as here, there is also no allegory.

[157] Perhaps the parable of the talents (Matt. 25.14-30) is a popular statement of the same philosophy, particularly when read with its variant, the parable of the pounds (Luke 19.12-27). In the latter the money is left with the servants with explicit instructions that it is to be used in trading, an instruction which must be understood also in the case of the parable of the talents, else the servant who hid his talent in the napkin did exactly the correct thing with the deposit. In both cases the money must represent divine powers which are put into the men, and which, as divine, must be actively operative. So the supreme sin was to bottle up unused the divine gift. But it is notable for our point that he who can successfully disperse this divine trust is thereby demonstrated as fit for rulership over cities, a sequence of ideas which is intelligible only in terms of the philosophy that the possession of divine powers is "ohne weiteres" the sign of rulership.

[158] See above, pp. 168 ff., 185.

θεῖον δικαστήριον, however that may have been constituted, this matter is omitted. It is rather the business of the ordinary judge, according to Philo, to take the power God gives him and work out his own solution without further aid. It seems to be the regular problems of the everyday judge which Philo has in mind.

Philo's discussion of the duties of the judge closes with a fine paragraph on the judge's attitude toward the poor:

> Besides these precepts already mentioned (Moses) has adduced another wise consideration, for he commands that no mercy be shown the poor in judgement,[159] although he has filled almost his entire legislation with commands to be merciful and humane, threatening with great penalties the insolent and haughty, but promising great rewards to those who are interested in repairing the misfortunes of their neighbors, and who regard their own aboundance not as their private possessions, but as the common property of every one who is in need. For that was a true thing and not without perception which one of the ancients said, namely that man is capable of doing nothing which would make him comparable to God except giving freely to others.[160] And what could be a greater good than that transient beings (γενητοῖς) should imitate the eternal God? Let not the rich man collect and treasure up in his house an aboundance of silver and gold, but let him make it public, to mitigate the hard lot of the poor with his cheerful bounty. And if any one has a distinguished position let him not exalt himself, boast, and be haughty, but let him honor equality, and allow humble people as many liberties as himself. And let him who has vigor of body be a support to those who are weaker, and not as in gymnastic contest knock out those who have less strength; rather let him delight in sharing his power with men whose own strength is exhausted. For people who have drawn

[159] Exod. 23. 3.

[160] Vahlen, as Heinemann points out here, in his edition of the Περὶ ὕψους, p. 2, l. 13, note, has identified this quotation as one associated with Pythagoras and Demosthenes. See also Cicero, *Pro Ligario*, 38: "Homines ad deos nulla re propius accedunt, quam salutem hominibus dando." Cicero's statement is, of the three, much the closest to Philo's meaning.

from the springs of wisdom banish envy from their minds, and without prompting put themselves of their own accord at the service of their neighbors, and pour streams of words into their souls through their ears to make others sharers in the same sort of understanding as they have achieved. And they rejoice at the sight of young men of fine natures, like flourishing plants of a selected stock, for they think that in them they have found heirs of their own intellectual treasure. So they take these young men and cultivate their souls with teachings and principles until they are fully grown and bear the fruit of moral excellence.

Such are the fine sayings woven and embroidered into the laws with reference to providing for the impoverished: only in the case of judgement is it forbidden to show mercy. For mercy belongs to the unfortunate; but he who commits a crime with willing intent is not unfortunate but criminal. And penalties are fixed for the criminal (ἀδίκοις), as are rewards for the righteous (δικαίοις). So let no impecunious scoundrel sneak out to find shelter and evade punishment by arousing compassion for his poverty, for what he has done deserves not pity (how could it?), but wrath. So let him who undertakes to be a judge, like a good money changer, analyze and distinguish the nature of the facts in question so as not to confuse the genuine with the counterfeit. [§§ 72-78.]

Thus in quoting the Jewish law that the judge is not to have mercy on the poor as such[161] Philo has felt obliged to point out that the poor are not neglected by Jewish teaching, and that this apparently harsh law refers only to the judging of a criminal. What Philo seems definitely here again to have in mind is the Diotogenes-Ecphantus conception of the justice-dispensing ruler, who was to make mercy, especially to the lowly and weak, one of his cardinal virtues, coördinate, indeed, with justice itself.[162]

[161] The conception is also emphasized in talmudic tradition. See Ritter, *op. cit.*, p. 104, n. 4. See also Philo, *Quaest. in Exod.*, II, 10.

[162] Diotogenes *ap.* Stobaeus, IV, vii, 62 (Wachs. et Heinse, IV, 269, 10 ff.), Sthenidas *ap.* Stob., IV, vii, 63 (IV, 270, 19 ff.), Ecphantus *ap.* Stob., IV, vii, 66 (IV, 278 f.). This last makes the ideal ruler a distributer of Equality, like Philo. See on these passages my *Political Theory*, pp. 73, 74, 86.

Certainly the judge-ruler must be merciful, Philo is saying, but not to the point of condoning crime. He insists that the Jews also looked to their judge-rulers to be the dispensers of saving wisdom and mercy, which they should give out through their λόγοι,[163] a conception which he clearly has not originated, but has taken over from his neighbors. So would the Jews too save men from their evil environment, and consequent degradation. But still justice is justice. The coins must be kept unconfused. There is no room for mercy, or rather for pity, toward a man's poverty in determining his guilt in a criminal trial.

So from first to last in his discussion of the judge Philo has been trying to show that the Jewish scriptural instructions to a judge were in harmony with the practical aspects of the current νόμος ἔμψυχος theory of the nature and duties of a proper ruler, a theory which, it seems, must have been applied by the Greeks to their courts in Alexandria, and which thus commended itself to Philo, since Jews agreed with Greeks that the ideal was correct.[164] Again Philo's discussion has given us a glimpse into Greek law courts as well as into the Jewish. There the judge sits, chosen by lot or election (Philo disapproves of the former), and thereby endowed with one of God's greatest gifts, the power of judging, which, if properly regarded, is a dispensation in God's name of God's own ruling will. He should then perfect himself in virtue. He is never to take a fee for judgment, even though the fee may not seem to him to have influenced his decision. He must be perfectly sincere in his desire to be just, and

[163] See Ecphantus *ap.* Stob., IV, vii, 65 (IV, 278, 12 ff.), and my *op. cit.*, p. 89.

[164] An interesting contrast to Philo's treatise on the judge is the purely Jewish address to judges, probably at Alexandria, in the Wisd. of Sol., 2. 1-5.

at the same time to be true to the letter of the law. To achieve this he must train himself in a habit of straight thinking and clear speech. A good judge must be a thoroughly upright character, off the bench as well as on it, else he will find himself incapable from his very nature of giving proper judgment. His decisions must regard only the facts in the case, not the personal standing of the litigants, whether they would naturally arouse his clemency by their close relations to him, or their honorable standing, or move his pity by their poverty, or arouse his antipathy by their erstwhile enmity to him. Yet close as he must keep to the facts and the law as he has received it, his judgments must not be slavishly literal interpretations of the code, but he must also bring to men the higher law of pure and ideal justice, and so act as a saving force in the entire community. Into this picture of the ideal judge Philo has fitted a few biblical phrases, but these, it is obvious, have been selected for their aptitude in expressing the Greek idea, and have been afterthoughts, not starting points, in Philo's thinking. And also it has appeared from Philo's treatment of the subject that the Greek ideal was not remote from the practical problems of the judge, but gave him an excellent foundation for the sifting of evidence and the conduct of a trial. If the Greek and Jewish courts in Alexandria practiced these precepts, they must have been courts of a very high order.

Philo concludes this section with the statement that there is very much more which could have been said about false witness and the judge, but that rather than be prolix he will go on to the last of the Ten Commandments, which, like the others, is really itself a chapter heading for another main division of the body of Jewish law.

So he takes up the commandment, "Thou shalt not covet" (§§ 79-135).

This command is a precept of the moral, not legal, realm, since it refers to a man's inner attitude and thought life rather than to his actions. So Philo in discussing it is confined largely to ethical theory. He sees in the precept a principle of law, or rather the principle underlying all law, since the sin of covetousness is what lies behind practically every illegal act. In public life it leads nations greedily to attack and try to despoil each other (§ 85); in private life the results of it are visible in robbery, murder, sexual crimes, and in short in all crimes, for crimes can in general be described as the invasion of other people's rights (§§ 84 ff.). But while the command cannot be interpreted as the basis of any specific penal or civil legislation, it serves Philo admirably as the peg on which to hang the whole body of Jewish law regulating food and diet, the purpose of which he represents as being the training of the faithful in self-control. So one is not to rush impetuously at food and drink, but contain himself until the first fruits have been offered (§ 98). Swine and fish without scales are forbidden altogether, not because they are essentially unclean, but because their flesh is the choicest of all meat and fish, and so abstinence from them calls out the greatest amount of self-discipline (§ 101). Wild and carnivorous animals have been forbidden as unsuitable nourishment for a man whose aim is peace (§ 103). That is, the goal of the legislation about kosher foods is to teach men the *via media*, for in allowing all but a few sorts of food Moses is far, Philo contends, from the extreme rigor proverbially associated with the code of the Spartans, and just as far from the equally proverbial luxuriousness allowed by the law-

giver of the Ionians and Sybarites (§ 102).[165] The section which follows is one of interest rather to the historian of ethics and mysticism than to the lawyer. Philo explains all the prohibited animals as being symbols of evil, and all those allowed as representing virtue. So, for example, the animal with the cloven foot is alone of quadrupeds permitted, because its hoof alone represents the proper distinction between good and evil: it does not confuse the two like the undivided hoof, which denies a distinction between good and evil, while it does not make meaningless distinctions like an animal with several toes (§ 109). Similarly the prohibited fishes without scales or fins seem to him not such powerful swimmers as the other fish, and hence not able to resist the drift and flow of their environment, obviously, to him, typifying the weak man who cannot resist temptation (§ 111). It is quite plain that Philo regarded these laws with great veneration, and the very extremes of allegory to which he is driven to defend them to Gentiles, who had no such laws of their own to which he could appeal, indicate how sharp a discrepancy Philo here feels between the ideas of his respected Greek neighbors and the profoundly revered practices of his race.[166]

Thus Philo has completed what he has to say of the Decalogue and of the particular statutes derived therefrom. But still there are a number of laws about which he wishes to speak, but to connect which with the Decalogue he is forced to another method of derivation. So he explains that the intent of the Decalogue as a whole is the inculcation of virtue, and he, like the Stoics and other

[165] The luxury of the Sybarites is interestingly discussed with many references by Bunbury in Smith's *Dict. Greek and Rom. Geography*, II, 1052.

[166] It is dubious how original Philo was in these passages, since the same arguments are expressed in the *Letter of Aristeas*, §§ 145-151.

philosophers, finds the cardinal virtues to be justice, courage, social considerateness (φιλανθρωπία), repentance, and true nobility.[167] Each of these virtues represents a certain aspect of the intent of the law as a whole, he says, and to teach them Moses set forth certain additional specific laws not already discussed. Under the heads of each of these virtues in succession, then, he discusses the pertinent ordinances. The discussion of Justice is included in our texts as part of the Fourth Book of the *De Specialibus Legibus*, but belongs in substance to the next treatise, *De Virtutibus*.

But into the exposition of the virtues we need not go. Philo's viewpoint has changed from that of the lawyer to that of the political and ethical philosopher, and his use of laws changes markedly. Laws are discussed now for their harmony with ethical rather than legal principles, and so while some of his remarks seem to point to practical law, as a whole they are so idealized that little legal conclusion seems possible from them, and only a few details will be mentioned. In §§ 193-196 he interprets the laws of Leviticus 19. 35 f., and Deuteronomy 25. 13 ff. as implying, or indeed as prescribing, the office of *agoranomos*, the Hellenistic master of the market who in every city had the important duties of supervising weights and measures, and the conduct of business in general. In another passage he ranks this office as one of the most important in the state.[168] Since of course no such office was prescribed in the Torah, Philo's attempt to read it back

[167] So they stand now in our text. Probably the original arrangement as they left Philo was: Justice, as part of the *De Spec. Legg.*, and then the three virtues Courage, Piety, and Philanthropy. Various virtues were discussed as going to make up these major ones, and it is to some of these subdivisions that the headings apply as the text now is. See Heinemann in *Werke*, II, 315 f.

[168] *Quod omnis probus liber sit*, 6.

into the Bible seems a witness, not to Philo's *naïveté*, as Heinemann notes at the passage, but to the profound assimilation by Jews of Hellenistic political ideas and practices. Heinemann points out that the same office had been introduced into Palestine. It would appear that Philo also expected the *agoranomos* to enforce the Jewish law[169] that the laborer be paid his wages at the time agreed upon, usually at the close of each day's work. Failure to pay wages was, of course, one of the matters under the supervision of the *agoranomos*, as is illustrated by the case of the strike of the bakers at Paros for nonpayment of wages, when the difficulty was adjusted by the *agoranomos*, who compelled the employers to pay the wages.[170]

Philo speaks with great respect of the injunction that the deaf and blind are not to be humiliated, the one by being reviled and cursed when he cannot hear, the other by being misled and tripped when he cannot see (§§ 197 ff.). He goes out of his way to denounce (§ 202) a common Greek custom which appeared particularly offensive to Jews, namely the mutilation of a corpse as an expression of contempt for the person who had died or been executed. There was no biblical statute to which he could appeal on the subject, and Philo must refer for punishment to the direct vengeance of God, but apparently the Jews felt strongly about the practice.

He has a very interesting discussion of the rules of war (§§ 219 ff.). In general he follows Deuteronomy 20. 10-20, but revises that passage in many details. For example the Torah says nothing of the grounds for war, but begins with "When thou drawest nigh unto a city to fight against it." The city, according to Scripture, is first

[169] Deut. 24. 15.
[170] Tarn, *Hellenistic Civilization*, p. 103.

to be offered peace on some humiliating terms, and if these terms are refused the city is to be destroyed, the male population annihilated, and the women, children, and cattle taken for spoil. Philo has no such marauding warfare in mind. The army is not to be organized and mobilized unless a city has refused to become an ally, and so has announced itself, he implies, as an enemy. Even so, before actually attacking, the army is to encamp near the walls where the inhabitants can see its strength, and is then to summon the city to surrender. If the city does so, a treaty of peace is to be made, whose terms Philo does not specify, although he does indicate that the treaty is to make a friendly peace. If the city still refuses to surrender it is to be razed, its army (adult male population) entirely destroyed, and the city burned. In requiring the burning of the city Philo goes beyond the severity of his biblical instructions, though not much beyond their implications. But he greatly softens them when he says that women and children because of their innocence are to be allowed their liberty, for the Bible says that the captives are to be the property of the Israelites for their enjoyment.[171] And even in the course of the siege no fruit tree is to be cut down to make a barricade or engine of war; only trees not bearing edible fruit may be so used. To this detail of the Bible Philo adds that the fertile land is likewise not to be ravaged. These humane touches in Philo's rules of warfare are a direct reflection of the Hellenistic humanizing of war. The successors of Alexander seem to have conceived of warfare and capturing cities as a means of getting not plunder but the control of a source of profitable revenue, so that captured towns

[171] In *De Virtut.*, 110 f., he praises the law of the Torah that the captive woman is not to be used sexually until thirty days after her capture, and even then is to be honorably treated.

were not razed, but only subjugated.[172] Cicero presents the same argument when he urges that the innocence of women and children should protect them from any vengeance of the enemy.[173] Of course the law was observed by the Hellenistic kings, as by the Romans, chiefly in the breach, and it has been pointed out that Philo too regarded women and children captives in war as naturally to be enslaved.[174]

The great "Exposition of the Law" continues to its close in the ideal strain, discussing not so much practice as ethical theory. The *De Praemiis et Poenis*, the final treatise, discusses rewards and punishments from the point of view not of the jurist, but of the mystical philosopher. So the rewards of obedience are, for the individual, mystical consummation, and for the law-abiding race ultimate supremacy; similarly punishments seem to be based upon the mystic's idea of supreme calamity, banishment from all hope of mystical joy and fellowship. The treatise has come down in a mangled form, for the section on racial punishment breaks off after it has just begun, and the manuscripts continue in what was obviously another division of the same treatise, a discussion of blessings and curses. The blessings he has in mind are apparently those of a current Messianic dream of the future of Israel, when all animals will be tamed, all enemies vanquished, and the Jews will become the supreme masters of the world, politically and financially, and will lend to all men in huge sums out of their superfluity. Then crops will grow in profusion, there will be no more barren women, and all mankind will be

[172] Tarn, *Hellenistic Civilization*, p. 71.

[173] Heinemann, *ad loc.*, refers to Cicero, *De Officiis*, I, 34; but it is in § 35 that the matter of the innocence of the noncombatants is mentioned, which is the essential parallel with Philo.

[174] See above, p. 52.

happy from early childhood to the end of life, which end itself will never come prematurely, for even illness will entirely disappear. The curses which attend upon disobedience are the reverse of all this happiness. But Philo ends the book in a burst of Jewish eloquence that some day the deliverance will come, the travail be at an end, and the Jewish people, by reason of their having become law-abiding, will be brought into the bliss that has so long been awaiting them.

It is when one comes again to this sort of writing that one sympathizes with the position of Juster, who, since he did not perceive that the bulk of the *De Specialibus Legibus* was written from a different point of view, felt that little could be made from Philo's pages of the actual Jewish legal practice in Alexandria. The contrast of point of view, most striking when once pointed out, is epitomized in what Philo himself says of the proper penalty of the sin of Cain.[175] He describes Cain's sin as comprising in one act all deeds that were *βίαιοι καὶ ἀσεβεῖς*. "What should be the penalty? Perhaps some would say execution. This is a *human* deduction made without reference to the Great Court; for men regard death as the extreme penalty, but in the divine court it is scarcely the beginning." So in most of his writing Philo is keeping constantly in mind the ideal demands of the divine court. But in his discussion of the detailed statutes of the laws of Moses he for once leaves this idealism, and treats laws and penalties from the *human* point of view.

[175] *De Praem. et Poen.*, 69.

V

THE JEWISH LAW OF EGYPT

IN his conception of the Jewish law Philo is very close to the writer of the *Letter of Aristeas*, who said of the sacred books: "For our laws have not been drawn up at random or in accordance with the first casual thought that occurred to the mind, but with a view to truth and the vindication of right reason (i.e., the Law of Nature)" (§ 161). But analysis of the *De Specialibus Legibus* has shown that in this treatise Philo is not trying as a theologian or mystic to allegorize the laws, but is attempting to demonstrate that a true understanding of the Mosaic code reveals it as the supreme code for practical administration. And his demonstration of its true meaning and supreme equity starts not from abstract theory but from the practical laws of his environment, which Philo is taking as the standard of what is right law, though he would himself have denied that he was doing so. In some cases the law he defends departs from what must have been gentile law in Alexandria and Egypt in his day, but in very few details indeed. For his argument, stripped of all pretense, amounts to a demonstration that, rightly interpreted, the Mosaic code prescribes the general principles, and in large part the specific statutes, of the Graeco-Roman system. In some aspects of life the old Jewish tradition is quite unchanged, especially in matters of cultus and diet. But in all matters of common law the law which Philo is defending is rarely Jewish except when the old Jewish precepts already harmonized with the practices in vogue in Egypt at the time. When there is any serious clash Philo scraps his Jewish

law, and demands, though he would never have admitted it, the practice of his neighbors.

That the law which he thus states is a law of his own theoretical construction seems to me entirely impossible. The apologetic theologian of Judaism or Christianity must be committed primarily to defending the divine nature and supreme value of the written word. He may allegorize this written word or tradition or doctrine into a meaning quite foreign to the original sense of his authority; but whatever he may end with, his obligation as an apologist is to prove that his result is a direct derivative from the original revealed words. This essential process of the religious apologist is the one most associated with Philo's name because he uses it so elaborately in his philosophic writings. There Philo's insistence upon the inviolability and value of every letter of Scripture amounts almost to a refrain. And he might have used the same method in a theoretical discussion of the Mosaic legislation in its relation to other codes had that suited his purpose. For it is interesting that we have from the late fourth century a little treatise, the *Lex Dei, sive Mosaicarum et Romanarum Legum Collatio*,[1] which, as the title indicates, attempts to harmonize the law of Moses with Roman law. It was written by someone able to quote freely from the jurists, but with no idea that he was doing more than ideally defending the ancient Jewish law. Some bit of law is quoted from Scripture, followed by a page or more of quotation of opinions from the Roman lawyers on the same legal problem. There is no attempt at harmonizing the jurists with biblical law. Obviously the writer has before him two codes each equally beyond his control, the Divine Code and the Ro-

[1] Seckel-Kuebler, *Iurisprudentiae Anteiustinianiae Reliquias* (Lips., 1927), II, ii, 325-394.

man law, for he is as little allowed by his conscience to alter one as he is allowed by the government to rewrite the other. There is a general similarity in tendency between the few Old Testament laws he quotes and the Roman laws with which he parallels them, and to point out that similarity by quoting the two together is as much as he can hope to do as a defender of the religious supremacy of the Torah.

But Philo's treatment of the laws here is utterly different from the method used by that writer. For the Sacred Word is deliberately ignored, or is misquoted or refuted outright, in case after case, until the resulting system is made into one which Jews could have used in their Egyptian environment under Roman rule. Philo's work has no value as a religious apology, because it does not defend the Jewish revelation as such. Yet as the religious value of the treatise diminishes, its legal value rapidly expands. For Philo is not proving the ideal, but the practical, value of the Jewish code, and in doing so he has in mind the code not as it was written in the Torah, but as it was administered in the courts. Only as a reflection of the law of the Jewish administration in Egypt is Philo's position in the *De Specialibus Legibus* in any way accountable.

Without repeating at too great length, then, it may be serviceable to give a summary of the legal system Philo has indicated.

Jews seem to have been divided off for administrative purposes into tribes or clans, phylae, in the Greek fashion, which bear no relation to the Jewish tribes of old (pp. 59, 62 ff.). The reality of the organization of the phyle is attested by the fact that all heiresses are to be married off to members of their own phyle to keep its property intact, and that when a family dies out its property re-

verts to the phyle as a whole, which had thus so real an existence that it could corporately hold property.

Within the family the strictest discipline was maintained, though the government of the family was, as in all Egyptian rulership, rather the coördinate reign of the father and mother than the autocracy of the father. Scripture is ignored to allow the mother a place beside the father in defending suits of misrepresentation of their daughter as a virgin to her future husband (p. 98), while great emphasis is laid upon the fact that the extreme penalty of death cannot be invoked upon a child by a single parent, but only when both agree (p. 73). In applying this extreme penalty, contrary to the rabbinic tendency, the private agreement of the parents seemed sufficient; the case was not, apparently, referred to any Jewish court, but at the instigation of the parents the neighbors simply took the child out and stoned him (p. 69). It would seem that the parents kept this extreme power over their children as long as they lived. Similarly, lesser penalties such as beating, imprisoning, disgracing the child could be resorted to, in which case the mother is not specified as necessarily concurring. Particular mention is made of the crime of striking a parent, which, treated with great severity by Greeks and Romans alike, was even more strictly regarded by the Jews in this code as a capital offense (p. 73), though the rabbis here again tended to be more liberal; but Philo authorizes the killing of a child who has so much as spoken ill of his parents, or done anything to put them in an unfavorable light (p. 73). The parents were not only the rulers of the child: they were the gods of the child, so that the child could take a legal oath in their name (p. 43). According to this code also the child was the legal slave of the parent, both by birth and purchase (p. 70), and probably the powers

of the parents were largely justified from this point of view.

But while the father and mother were at least somewhat coördinate in their rule over the children, they were by no means equal to each other in power. The women were to be kept off the street, with the virgins in the interior parts of the house, and the married women inside the outer threshold. When religious duties called them forth they should go to the temple (synagogue) at odd hours so as not to attract attention. They should never attend athletic contests. Within their own sphere of οἰκονομία women seem to have been supreme (p. 130). Yet, while they were given legal rights when the children were involved, they were kept in general distinctly subordinate to the men. So a woman's oath was invalid if she was married or was a virgin under her father's care, unless the husband or father respectively consented to her oath (p. 44). But while men acted thus legally for the women of their households, if a natural guardian like the father or husband was not at hand the woman or virgin seems to have had a legal standing of her own, as illustrated in the matter of the oaths again, and in the process for a man who has raped or seduced a virgin (p. 92). That is, the Jews, like their Greek neighbors in Egypt, did not seem to feel that a woman must invariably be represented at law by a κύριος as did the rest of the ancient world. But the generally subordinate place of woman is illustrated best in the law of inheritance. For while the unmarried daughter took an equal share with the (younger) sons, and became a ward of her brothers until they had married her off, thus guaranteeing a dowry for the girl, and her proper disposition in marriage, daughters who were already married had no share in the inheritance at all if there were brothers, and,

if there were no male heirs, inherited only in trust for a son (p. 58, and below).

The husband and wife regarded their relations as very sacred. Jewish marriage had taken on the Ptolemaic form of first being registered by ὁμολογία (pp. 94 f.), wherein the couple declared themselves as ἀνὴρ καὶ γυνή, settled the terms of dowry, and contracted to go on to complete marriage. If Jews went on to follow the Greek custom they might then live together, and complete the marriage at a later specified time, or at their joint pleasure. This contract had the force of marriage at least as far as making infidelity on the part of the woman a crime (ὑπογάμιον) equal in Philo's eyes to adultery. Whether the Jews also took over the custom of allowing the man and woman to live together in the interval cannot be determined, but seems to me on the whole to be likely, since Philo is so strict in demanding that ὑπογάμιον be treated as *de facto* adultery. After the couple had been fully married divorce seems to have been legitimate on several grounds (p. 82), the only one specified being barrenness of the woman. But since the husband who tires of his wife, and tries to represent her as not having come to him a virgin because he can find no other pretext for divorcing her, has to take such great trouble and risk to be rid of her (pp. 97 f.), it would seem that divorce was hedged with distinct limitations. The only ground indicated for which a woman has right to divorce her husband is in the case where he has publicly attacked her honor in legal accusation (*ibid.*).

Adultery, which implies always infidelity of the wife, or the violation of another man's bed, not infidelity of a man to his own wife, was a crime usually punished by the injured husband's killing the sinner on the spot, if detected, or even, apparently, by his hunting out the adul-

terer and being legally protected in killing him. Jewish trial for adultery is not mentioned, and Philo's calling the crime a *crimen publicum* indicates that it was, as we know from other sources, allowed to be tried only in Roman courts. In case a man only suspected his wife he might take her to Jerusalem for an elaborate trial by ordeal at the temple (pp. 80 ff.); what men did who could not afford such a trip is not indicated.

Daughters, as has been said, were carefully guarded in the inner rooms of the houses, and not allowed to come out unprotected. So their virginity was guaranteed to their prospective husbands, and misrepresentation of virginity was not only actionable for fraud, but was so serious a charge that it was heard by the supreme court of elders in full session (p. 98). If the girl's parents lost the suit the girl was to be stoned, and probably her dowry became the possession of the husband, though this is not stated. If the father died the responsibility for guarding the virgin daughters passed to the sons, who must not only guard them and ultimately marry them off, but meanwhile must educate them (p. 59).

Household slaves had a number of peculiar rights among the Jews. According to the Jewish law there were two distinct sorts of slaves, full slaves and the Jewish bond servants who for debt or inability to pay damages in a suit were enslaved (p. 152), though by Jewish law they must be restored to freedom after seven years. These were not to be regarded as ordinary slaves, and must be treated with consideration (p. 52). Only Gentiles who had been captured in war, or born in slavery, were regarded by Philo as fully slaves. Even these were theoretically to be ranked as human beings, and as such they had a few basic rights (*ibid.*), chiefly the right to live, and keep their bodies unmutilated. There is even provision that the de-

liberate killing of one's own slave is a capital crime, and though Philo seems not to be in sympathy with the law, he does agree that it is much better to have criminal slaves legally executed by a court, rather than privately killed by their masters (pp. 121 ff.). Similarly he indicates that the Jewish law was enforced that a slave who was maimed permanently by his master should be set at liberty, though Philo was aware that the law was an anomaly in Egypt, and in my opinion he does not approve it (pp. 140 f.). For, for all his theory of the human nature of the slave, and his insistence upon kindliness in their treatment (pp. 52 f.), he is far from being an opponent of the system. The real reason he would be humane is because slaves cost much money and will give better returns if well treated (p. 125), while their manifold services are quite essential to life as he views it from his aristocratic standpoint. The use of the lash he takes for granted as a good medicine for them (p. 52). But legal provision is made for them when their life is threatened, or becomes quite intolerable, in that the Jews took over the Greek custom of allowing a persecuted slave to run for shelter to an asylum, if necessary to the altar, the hearth, within a strange household, where he or she would be inviolate. The owner of the house where the slave had taken refuge must then get the fugitive to return to his master of his own accord, or must sell the slave and give the money to the owner (pp. 53 ff.).

The property and position of the father of the family as a constituting member of the phyle is assured perpetuation by the law of inheritance, which makes no reference to wills, or the right of the father to dispose of his property at death according to his pleasure, but which sets a certain fixed order of succession. The normal heirs of the father's property, along with his *τάξις* and *ἀξίωμα*, are

the sons, preëminently the eldest son who took a double share of the property which was otherwise divided equally between the sons and unmarried daughters. An unmarried daughter had a claim for a dowry during the life of the father, and her claim was satisfied by her inheritance. When there were direct heirs the procedure was simple. But if there were no sons, or, we infer, sons of sons, the inheritance passed, after provision apparently for unmarried daughters, to a married daughter, who held the inheritance only in trust for one of her sons, who upon coming of age seems to have succeeded to the τάξις and ἀξίωμα in the phyle which the deceased had held (pp. 59 f.). If descendent heirs were wholly lacking the order of inheritance was: First, brothers of the deceased; second, the father of the deceased; third, the father's brothers; fourth, the father's sisters; fifth, the next closest kin available. If the deceased had no relatives at all the inheritance reverted to the "larger family," the phyle (p. 62).

Property rights and ownership were carefully guarded. Like the Romans, and unlike the Greeks, Philo regarded theft as a serious crime primarily because it attacked the sanctity of property rights (pp. 147 ff., 153). Not much of the law of property is mentioned, but it was quite sane if we may judge from what we know. In the country was stationed an ἀγρονόμος, by which reference is probably made to a Jewish rural officer, who heard cases particularly of trespass and damage (p. 159). On the subject of malicious or inadvertent trespass the Jewish law was much milder than Philo liked, for while the Greeks allowed double damages, the Jewish law called only for simple damages, which were probably payable in money, though they may have been settled by surrendering an equivalent amount of land for the neighbor's use (p. 157).

The same penalty was assigned for uncontrolled fire which spread over into the neighbor's property (p. 159). In both cases the suit seems to have taken the form of δίκη βλάβης used by the Alexandrine Greeks. This represents a sharp revision of the scriptural commands. In the same way is treated damage done by unguarded domestic animals who are ferocious. If the owner is not aware that his animal is dangerous, and yet it kills a man, the beast is to be killed, and no more action is to be taken. But if the owner knew that the animal was a menace, and yet took no, or inadequate, precautions to secure him, the case went to the judge, presumably still the ἀγρονόμος, who decided whether the matter were really murderous, and so deserved a capital penalty, or only a case of criminal carelessness which could be settled with a fine. Philo has nothing to say about what circumstances would make the case a capital one. The fine is left open for the court to fix, but the criterion for the amount of the fine seems to have been the degree of negligence as well as the amount of damage, as will appear later. If it is a slave that is killed, the fine is to be the value of the slave. If the ferocious beast kills the domestic animal of another man the owner of the dead beast must be fully indemnified, but the owner of the attacking animal keeps the dead carcass. This law also Philo thinks to be rather too lenient, because his neighbors treated such cases more strictly (p. 128), but apparently Jews still kept their traditional penalty. This is all the information Philo gives about property law, and it is unfortunately not extensive. It is the old law of the Torah, revised in several details, but still keeping the traditional penalty of simple damages, in spite of the heavier penalties of the Greeks and Romans. The fact that Philo disapproves the penalty adds

confidence to our belief that the procedure was actually as he describes it.

Of contract law little also survives. The only sort of contract Philo specifically mentions is that which mortgaged a man's means of livelihood, where Philo's law, while a generalization from the scriptural prohibition of taking a mortgage on a miller's millstones, is really an adaptation of Ptolemaic law. Philo's words seem to imply that the Jewish courts would not allow a mortgage to be foreclosed which deprived a man of his means of making a living, in which case such a mortgage would never, of course, have been taken originally (p. 142).

Of loans and finance Philo tells us that a Jew was strictly forbidden to lend money on interest to another Jew, but was quite at liberty to do so to Gentiles (p. 50). Loans were made either with documentary guarantee, or before witnesses (p. 164). The Jewish sabbatical clearance of loans seems to have been enforced (p. 50). Further information about loans is not given, probably because if loans with interest could legally be made by a Jew only to a Gentile, litigation in connection with the transaction could not have been heard by the Jewish court. In the matter of loans of animals or objects the value of the loan must be made good if it could not be returned in good condition, unless the owner was present when it was stolen, if that were the plea for non-restoration of the loan, or when, if an animal, it had died (pp. 173 f.). The owner in that case was held to know that all had been done in good faith by the borrower, for he had had enough opportunity to see how the loan was being used. Philo gives only a hint of the law here, but the hint suggests that if the lender saw his property being abused or neglected, he should at once reclaim the property or take the consequences of the abuse.

Philo has given a vivid picture of the law and procedure in connection with deposits (pp. 164 ff.). One who wished to make a deposit went to his friend with the goods or money, usually secretly so as not to increase the danger of theft, and he and his friend took oath privately together. The one swore that he would call for the goods at a stated time, so as not to make the demands upon his friend's services indefinite, and so as to leave the friend free to dispose of the goods in case the depositor, who was very likely going off on a journey, should meet with some fatality. The other swore to restore the deposit upon demand as he had received it. In case the goods were then stolen, when the depositor returned for them both men went to some Jewish court, where the receiver swore a terrible oath that he had himself neither stolen the goods, nor caused them to be stolen, nor pretended a theft which had not actually occurred. This oath closed the matter between them, and the owner of the goods had to be content with his loss as though they had been stolen and unrecovered when in his own possession. The presumption is that if the owner charged some other sort of abuse of faith that other charge would have been treated in the same way. In case the thief were caught the receiver took the action against him, and paid the owner the double fine in advance. Since the provision is so strongly Jewish one is tempted to carry over the provision of Josephus, and to state that some cases of default where there had been no suspicion of bad faith on the part of the receiver were covered by restoring only the value of the goods to the owner. The whole is a perfectly practicable scheme of action. The fact that this tradition, though developed with sharp instinct for practicality, is kept on a strictly Jewish basis recalls the fact that contracts between Jews were so outstandingly a matter for Jewish supervision

that this branch of the law is the one specifically mentioned as being under Jewish control by Strabo in his remarks on Jewish jurisdiction in Egypt (p. 17).

The oath of clearance was modified in connection with the deposit of animals to cover the case where the animal had died while in the hands of the receiver. Here the oath seems to assert not only that the animal was dead but that there had been no breach of faith with the owner in connection with its death, as there might have been had the animal been worked to death, underfed, or neglected (pp. 170 f.).

In criminal law, like the *Lex Aquilia* of the Romans, Philo seems to distinguish two principles as grounds for action (p. 162). The less important is negligence or carelessness. It is to be doubted that Philo would himself have classed this as a principle of crime, but he made it ground for action in several cases. In the case just mentioned of a fire, which, started on one's own premises, gets out of control and destroys the property of one's neighbor, Philo distinctly says that the ground of the action is the carelessness of the man who started the fire. He speaks in a way to recall the Roman *culpa* (p. 163). The same principle seems to underlie also cases where one has neglected to protect a pit, or to put a guard rail on his flat roof, so that an unwary person has fallen in, or off, respectively, and been injured or killed (pp. 128 f.). If an animal is injured by falling into the pit the owner is to be indemnified to the extent of his loss. If a person is killed by either of the two falls the relatives are to bring suit, and the court is to judge whether the matter is to be settled by paying damages, or the negligence was so culpable as to warrant a corporal penalty. What the latter penalty would have been is not indicated, but judging from the case immediately to be cited it might even have

been capital. It is clear from this case that only the more serious and perverse types of negligence were deemed criminal, though all injury due to negligence was actionable. The same principle seems to have been involved in the case of the owner of the ferocious beast just mentioned (p. 223). Similar action is to be taken: the relatives bring suit, and the court is to decide whether the matter is to be settled by a fine, or by stoning the owner of the beast. The whole was clearly a matter of the extent of negligence, for if the owner had had no warning that the beast was dangerous all liability was dismissed, even if the animal had killed a man, by simply dispatching the animal. Similarly a claim of carelessness seems to have been basis for action against the holder of a deposit (p. 173), and, as I have pointed out, it was really because of his own negligence that a man lost all claim for indemnification for goods he had loaned if he was himself witness that they were being mistreated, but took no steps to reclaim them.

But ordinarily in crime the principle involved is assumed to be malicious intent. This is most clearly illustrated in Philo's argument as to the nature of the crime of false witness. By giving false testimony, on the basis of which the judge had pronounced a wrong decision, the false witness had made the judge break his oath of office. The law was violated, then, in the crime of the judge in breaking his oath, but the judge was guiltless because, Philo follows the *Lex Cornelia* in explaining, he was innocent of any evil intent. But the oath was broken by the malicious purpose of the false witness, who accordingly, though he himself did not directly commit the crime, was held fully responsible (p. 178). However unsatisfactory an explanation of the criminal principle of false witness this may seem to us, at least

Philo's identification of crime with malicious purpose stands out in bold relief. Similarly under murder the distinction between φόνος ἑκούσιος and φόνος ἀκούσιος was not that between premeditated and unpremeditated murder, but between homicide in which there was any malicious intent, and purely accidental homicide (pp. 101 f.). He specifically states that the criterion was whether or not the deed were done ἐκ προνοίας (p. 102). The act must not only have been done intentionally, but the intent must have been malicious, for he recognizes a φόνος δίκαιος which, far from being dishonorable, was honorable and praiseworthy. Only homicide which involved ἀδικία was actionable (p. 121).[2] So βούλευσις, plotting a murder, and ἐπίθεσις, or τραύματα καὶ πηρώσεις (p. 137), attempted murder, were to be treated as murder done and accomplished at first hand (p. 101). By the same reasoning poisoners were to be classed as murderers, though murder primarily meant a direct attack with a weapon, for they too had the murderous intent, their "minds were polluted" (pp. 104 ff.). This theory that crime was a matter of intent is expressed in terms of Greek law, but obviously, as appeared in the cases of false witness and murder, goes back to Roman theories of crime (pp. 101, 178).

The specific sorts of homicide are treated under several heads. Only premeditated murder in our sense of the term was to be visited with the death penalty (pp. 103 f.). Second degree murder, murder committed as a result of sudden anger but with no previous deliberation, is put as "half" as serious as deliberate murder, and though the penalty is not indicated, it is obvious that it would not

[2] On the identity of ἀδικία and τὸ ἑκούσιον see Arist., *Eth. Nich.*, V, x, 1135*a*, 15 ff.

have been capital.[3] Poisoners are to be lynched, and not allowed to come to the (Roman) court at all, the only possible Jewish treatment of a criminal who would have fallen within the exclusive province of the Roman courts. The crime itself is defined with clear reference to the Roman *Lex Cornelia* (pp. 107 ff.). In case of a sudden quarrel or general riot a man who struck another was to be held fully responsible (apparently for second degree murder) if the victim died, but if he recovered the assailant was to indemnify the victim for the loss of time and for the expenses of his illness (pp. 109 f.). Thus far Philo's law of murder follows Roman procedure exactly. But in classing the exposure of newly born children as φόνος ἑκούσιος he has again become Jewish. If a child fully formed is killed, he argues, whether by exposing it, or by its being brought into a premature stillbirth by someone's striking the mother (pp. 111 ff.), the deed is to be adjudged deliberate murder and worthy of death. Since there was no justification for such a law in Roman practice, consent had to be obtained from the Roman officers, or the offenders had to be lynched. But since Hecataeus states that the Jews compelled the bringing up of their children, there is good reason to think that the law was enforced. Similarly Philo treats as deliberate murder, though as has been said he shows little personal sympathy with the law, the act of the slave owner in deliberately killing his own slave (pp. 121 ff., 220 f.). This also seems quite against what we can gather of Roman law at the time, yet it goes much beyond what is required by the Torah. Again a person who did this act would not have been claimed by any Roman tribunal, and Jews would

[3] In the case of raping a widow, since there was no adultery involved, Philo calls the crime again "one half as serious (as adultery), and so the criminal shall be relieved of the death penalty." III, 64. See above, p. 89.

have been at liberty to proceed at their own will. The laws for murder then followed Roman law carefully throughout, and represent Philo's, or the Jewish courts' reading of that law back into the Mosaic code, since the specific Jewish tradition for murder, whatever it might have been, had under Roman rule become a dead letter. In only a few cases, which Rome would not have held to involve murder, and so would have allowed to be tried in Jewish courts, does the Jewish tradition assert itself.

Φόνος ἀκούσιος, accidental homicide, was not a penal affair by Roman law, and is left unpenalized also by Philo (pp. 117 ff.). Indeed, in terms of Greek argument, he says that in case of pure accident in which someone is killed the presumption of guilt is against the victim, the presumption of innocence in favor of the unintending perpetrator. Hence asylum was available to protect the innocent homicide, though what form of Jewish asylum was used he does not make clear. But he exactly expresses the Roman attitude toward asylum by insisting that it was to be used to protect only those who were innocent, and that criminals were to find no protection there (p. 103).

The only penalty for murder which the Jews executed seems to have been lynching by stoning, and in that case the head was cut from the corpse and exhibited publicly for a few hours, though always cut down and buried before sunset (p. 134).

It has appeared that Philo's discussion of theft is based upon the Roman conception of the crime, by which all peculation is considered as a more or less aggravated instance of a single sort of offense against society, namely the attacking of the right of property and ownership. This, says Philo, is the principle involved in crimes which ranged from petty larceny to a tyrant's pocketing the

resources of a nation, or one state's plundering of another (pp. 145 ff., 153). But if the principle involved in all theft is identical, there is a sharp distinction in treatment between the thief and the robber, which was made on the basis of whether the criminal tried to hide his crime, to steal without the knowledge of the owner, or of society, or with bold face he openly forced the owner to hand over the goods. The distinction is not only similar in Philo's law and the Roman tradition, but seems to represent the Roman division of jurisdiction in Egypt. For open robbery was a crime handled directly by Roman courts and officers in their capacity of guardians of the public safety and order, and Philo refers action for such criminals to a public (κοινός) tribunal, which must have been that of Rome (pp. 148 ff.). Jewish courts would have had nothing to do in such a case. But in handling the sneak thief, that is any kind of thief or burglar who recognized the law to the extent of trying to escape detection, the procedure was a private one in the Jewish court, with Jewish penalty, if the plaintiff and defendant were both Jews. If the culprit could not pay the fine he was to be sold into slavery, or possibly to become the slave of the plaintiff (p. 151). The Jewish fine of double the peculation seems to have been applied to all theft within the jurisdiction of the Jewish courts except where the old biblical law specified that the penalty for stealing a sheep was fourfold, for stealing an ox fivefold (p. 155). But these penalties, while kept in deference to the Torah, were not allowed to interfere with the general practice.

A much more serious matter, because it involved homicide, was the question of the right of a householder to kill a burglar caught in the act (pp. 154 f.). Because of its seriousness Philo's law is again squared with the Roman: he says that at night such a thief may be killed by the

householder, since it would be impossible then to get assistance either from police or one's friends. But in the daytime when help could be summoned, it was criminal to kill the thief, though it seems likely that if the help did not arrive, and the householder was in personal danger, the restriction would not apply.

The crime of kidnapping free men and selling them into slavery, which Philo classifies as a form of theft, will serve as an excellent transition from theft to assault. Philo is quite vague as to the treatment of a man who has kidnapped a member of another race, such as if a Jew had kidnapped an Egyptian and sold him into slavery, probably because that sort of case would never have been left in Jewish hands (p. 156). But when a Jew thus abducted and sold another Jew then the death penalty must follow ἀπαραίτητος, inexorably. The word recalls the lynching to which the Jews would have resorted.

The various forms of action for assault are the most difficult part of the criminal law of Alexandria, and unfortunately the picture is not entirely clear from what Philo says. In these crimes of less serious nature it is well known that the Romans left the local laws as far as possible undisturbed, and particularly in crimes of assault the Greek action appears the prevailing one in Egypt for a couple of centuries after the Romans took control. So it is with the Greek procedure that Philo is harmonizing his law, or showing it as having been harmonized. Attic law had a general process for damages called the δίκη βλάβης, which covered property damage, and which was the process used before the ἀγρονόμος in Philo's cases of rural property damage. The word also appears correctly used in connection with the Jewish penalty for theft, which was a fine, and which Philo describes as a most just βλάβη suffered by the *thief* (p. 149). The general

word in Attic law for personal assault was *αἰκία*, or *αἰκεία*, to which corresponded the process *δίκη αἰκείας*. This was a private suit introduced by the injured party whose claim was that the defendant had struck the first blow. More serious was the suit *τραῦμα ἐκ προνοίας*, or *τραύματα καὶ πηρώσεις*, murderous assault, which was tried by public suit, and carried as penalty *ἀτιμία* and confiscation of goods. In Attica also the term *ὕβρις* was used in two ways, generally of any serious affront, as we use the word contumely, and specifically of the process *γραφὴ ὕβρεως*, the common redress for aggravated assault, carried on by public trial, and carrying the penalty likewise of *ἀτιμία*.[4] There were pleas *ὕβρις διὰ πληγῶν*, for an aggravated *αἰκεία*, or *ὕβρις δι' αἰσχρουργίας*, *ὕβρις διὰ λόγων*, both aggravated *κακηγορία*. As in our aggravated assault, *ὕβρις* always involved malicious intent, while one might get a judgment for *αἰκεία* when the damage had not been maliciously intended.[5] In addition to these there was the plea *βιαίων δίκη*, entered for forcible deprivation of goods, and sometimes for acts which we would regard as personal assault, such as the raping of a virgin. Her right to legal action, or her guardian's, was the forcible taking away from her of her possession.[6] Careful jurists distinguished between the term *βίας δίκη*, which would have meant an action for violence, but which was not the name for any distinct type of legal action,[7] and *βιαίων δίκη*, which meant an action for forcible (*βίᾳ*) deprivation of goods.[8] But this distinction seems

[4] Hitzig, *Injuria*, pp. 35 ff. [5] Lipsius, *Attisches Recht*, p. 644.

[6] Lucian, *Hermot.*, 81. Lipsius, *op. cit.*, p. 637, n. 1.

[7] Philo seems to use the word in this sense in connection with *ὑπογάμιον*. See above, p. 96.

[8] See *Lex Cantabr.*, p. 665, ll. 26 ff., that is Scholion to Plato's *Repub.*, 464*a* (quoted by Lipsius, *loc. cit.*): *βιαίων δίκη βίας δίκης διαφέρει· βιαίων μὲν γάρ ἐστιν, εἴ τις βίᾳ ἐπεισελθών τι ἔλαβεν ἢ ἐκ χωρίου ἢ ἐξ οἰκίας, βιαίων ἐκρίνετο. . . . σημειωτέον δὲ ὅτι βιαίων γράφουσι τὴν δίκην οἱ παλαιοὶ καὶ οὐδεὶς βίας.*

largely to have disappeared later, and the action to have been generally called *βίας δίκη*.

In the Alexandrian law of assault many of the same terms are used, but apparently with somewhat different meanings. In place of the single *δίκη αἰκείας* for various sorts of physical assault Alexandrian law had a series of distinct pleas: *σιδήρου ἐπάντασις*, threats with a weapon; *πληγαί*, striking; *αἰκισμός*, inflicting bodily injury; there were others, but all were classed under the general term *ὕβρις*. But while all these were *ὕβρεις* there was also a distinct *δίκη ὕβρεως*, a private accusation for injury of various kinds, which by no means had the serious implications of the Attic *γραφὴ ὕβρεως*.[9] Partsch sees in the *Dikaiomata* a much more typically Greek understanding of *ὕβρις* than the Attic.[10] Hitzig, he points out, had said that in the act of physically overpowering a fellow citizen consisted the "wesentliches Moment" of *ὕβρις* in Greek law. But Partsch sees evidence for believing that "already in early times *ὕβρις* implied the deliberate disturbance of the public peace, and the disturbance of that protection which the public peace owed to the person of some other man."[11] For better than the extremely technical and specialized *γραφὴ ὕβρεως* of Athens does the Alexandrian law fit into the use of the word even by Plato and Aristotle themselves. Indeed he thinks that the Roman conception of *injuria* was taken directly from the *ὕβρις* of the Greeks of South Italy.[12]

Βία is another criminal category in Ptolemaic law, although it is hard in every case to distinguish it from *ὕβρις*. Crimes of *βία* were: (a) the using of force of any

[9] Graeca Halensis, *Dikaiomata*, 78; Taubenschlag, *Strafrecht*, pp. 10-21.

[10] "Die alexandrinischen Dikaiomata," in *Archiv für Papyrusforschung*, VI, 54 ff. Cf. E. Weiss, *Griechisches Privatrecht* (1923), I, 160 ff.

[11] *Op. cit.*, p. 57. [12] *Ibid.*, p. 62.

kind to compel a person to do anything to his hurt; (b) forcibly setting aside a person to do injury to his property; (c) fraudulent withholding of tribute; (d) frustrating the execution of justice.[13] The former two were more typical than the latter two. But it is clear that a single act might be both *βία* and *ὕβρις*, *βία* in so far as it affected the forcible taking of property, *ὕβρις* in relation to the injury done the owner. *Βία* was a more serious crime than *ὕβρις*, because it involved a private attack upon an individual, plus the public crime against property rights. Hence while *ὕβρις* was settled simply by paying damages to the plaintiff, *βία* carried with it a fine to the court in addition.[14]

In Philo's remarks these and other terms appear in a most interesting way. As *βία* he classifies the following crimes:

First there is the crime of raping a virgin, which he correctly calls *βία*: the assailant *νόμου βίαν, ὡς φασί τινες, προτιμοτέραν θέμενος, ἁρπάζῃ καὶ φθείρῃ ταῖς ἐλευθέραις ὡς θεραπαίναις χρώμενος, τὰ πολέμου δρῶν ἐν εἰρήνῃ*, "preferring, as they say, *βία* to law, seized and ruined her, treating free girls like slaves, doing an act of war in time of peace" (III, 69). He now goes on to speak of the girls as *ἡ βιασθείση*. This is not only correct legal usage by Alexandrine standards, but is a splendid clarification of *βία* in its relation to rape. If we may view *βία* as an aggravated form of *ὕβρις*, the resemblance is most striking between Philo's words and Partsch's description, just

[13] Taubenschlag, *op. cit.*, pp. 21-23.

[14] In passing it is to be noted that in Papyrus Rylands 141, of 37 A.D., a petition is preserved in a case of assault with deprivation, described as involving injury to *τὰ δημόσια*. The case is not called by any technical term in the petition, though it is obviously *βία*, and was so serious that the petition was addressed not to the local chief of police, but to the centurion.

quoted, of the essential element of ὕβρις as being a disturbance of the public peace, plus the invasion of that protection which the public peace guarantees to the persons of citizens.[15] Again Philo's τινες are obviously Greek lawyers of Alexandria. But though the legal principle Philo has in mind is Greek, the treatment of the criminal which he indicates is Jewish, for the offender can escape further penalty if he marries the girl, and himself supplies her with her dowry (p. 91). That is he might get off in that way if he were acceptable to the father, or to the girl herself if the father were dead. Otherwise he has to provide her with her dowry (that is, pay the damages of her virginity), and in addition pay a fine. The procedure is throughout the Alexandrine action for βία fitted into Jewish law. As in similar cases in Greek law initiative of action was in the hands of the father, though whether the girl's brothers or guardian took the place of the father if he were dead does not appear. It is made clear, however, that the girl was to be her own spokesman as to whether she would marry the man or not if the father were dead.

The raping of a woman who was in some way widowed, so that neither adultery nor rape of virginity complicated the crime, apparently fell between βία and ὕβρις, and so Philo calls it both, and adds ἀκολασία and θράσος as well (pp. 89 f.). Since it was left to the court to decide whether the penalty should be corporal or a fine, the treatment seems not exactly like either βία or ὕβρις, for in cases of both these types the award was first of all damages to the injured party. Apparently this crime was judged to be essentially against the public peace, and the woman, since she neither lost her virginity nor was forced into adultery, could not have been considered as having

[15] See above, p. 235.

suffered any appraisable injury. So, as the crime fits none of the categories exactly, Philo names them all.

In one other important case Philo has used the term *βία*, that is in connection with highway robbery, which was distinguished as stealing done *βίᾳ καὶ φανερῶς* (pp. 148 f.). But here it has been seen that the term is used not in its Greek sense, but as the Greek equivalent of the Roman *vis*, and so does not come under discussion of the Greek crime.

Philo oddly avoids the word *βία* in the discussion of the crime of so striking a pregnant woman as to make her miscarry before the fetus is fully formed (pp. 111 ff.). As has been seen, Philo's Jewish procedure called in such a case for a double fine, part for the court, and part to indemnify the husband for his loss, though the Torah mentions only single damages. The penalty as Philo gives it, and the crime itself, correspond exactly to the Alexandrian *βία*, the forcible deprivation of property. But instead of calling the crime *βία* he calls it *ὕβρις*, or at least he calls *ὕβρις* that aspect of the assault for which damages were owing to the husband. As a separate count from this *ὕβρις* and its fine is the fine to the court, which is not, as might have been expected, put on the basis of punishment for *βία*, forcible deprivation, but on the ideal footing of a penalty for interfering with the work of nature. This is a most interesting variant, for by Plato and Aristotle an interference with the work of nature was called *βία*. In the realm of natural science Aristotle speaks of vapor whose motion is *βίᾳ μὲν κάτω, φύσει δ' ἄνω.*[16] Plato uses the word twice in recording the objections of sophists to the law of the state which seemed to them a *βία* interfering with their natural right of self-

[16] *Meteriolog.*, 342 *a*, 25. Cf. Hirzel, *Themis, Dike, und Verwandtes*, p. 131, n. 1; p. 222, n. 5.

assertion.[17] This conception was carried over to the Latin *iniuria*, as is illustrated by Seneca: *quia natura ignem sursum vocat, iniuria deorsum premit;* of vapor he says *saepe concipiunt corruptae per iniuriam.*[18] Seneca is obviously following Aristotle so closely as almost to be translating him, and the reason for translating the word βία with the legal term *iniuria* seems to me to be clear. For by Seneca's time in the *koine* βία had become a legal term nearly the equivalent of *vis* and *iniuria*, and it was with this meaning of the word in mind that Seneca seems to have read Aristotle's statements. So in his paraphrase he uses the legal term in Latin. But did βία, as it became the term for a specific legal action, retain its scientific and philosophic meaning of "contrary to φύσις," so that it would be a legitimate plea in court in a suit for βία that the defendant had forced the plaintiff to do something contrary to nature? Of this I can find no trace except this passage of Philo, where, leaving the Torah quite behind, the crime is described and treated as though it were βία, yet the aspect of the crime which would have lifted it above ὕβρις into βία is called not βία but interference with nature. I suspect strongly that βία did have this meaning in law, and that a reader of the time in encountering Philo's phrase would have recognized not a philosophical gesture, but a correct description of one sort of criminal βία. If this is true the definition of βία in Alexandrian law would have to be expanded to include the crime of obstructing natural right or operations. Philo's evidence is in itself not warrant for going so far, but seems clearly to point in that direction.

An interesting use of the term ὕβρις appears also in

[17] *Protag.*, 337*d*: ὁ δὲ νόμος, τύραννος ὢν τῶν ἀνθρώπων, πολλὰ παρὰ τὴν φύσιν βιάζεται. Cf. *Repub.*, 359*c*.

[18] *Nat. Quaest.*, II, lviii, 2; III, xx, 1. Cf. IV*a*, ii, 5.

connection with the crime of adultery. If the adulterer was not killed out of hand by the injured husband, action, as has been seen, was a Roman affair, and no Jewish law applied. But in discussing its general nature Philo calls it ὕβρις in a passage which recalls the classical rather than the Alexandrian ὕβρις. He says of the adulterer and adulteress, "Each of them is filled with ὕβρις, and ἀτιμία, and the greatest shames."[19] And further, "The adulterer commits ὕβρις and vomits forth his passion (*sc.* to the humiliation of the husband); he goes away leaving the wretched seed which he sowed, and laughing at the ignorance of the man he has criminally injured."[20] The explanation of the crime is one which would have fitted into any classical Greek exposition, for in Attic law the γραφὴ μοιχείας was so similar in both conception and treatment to the γραφὴ ὕβρεως that it would almost seem right to call the former a special type of the latter. At least such a point of view would have been perfectly intelligible to the Greeks. Such Philo is obviously doing. Ἀτιμία was one of the usual penalties in Athens for conviction on a γραφὴ ὕβρεως, and the essential feature of ὕβρις was the insulting and humiliating of a fellow citizen.[21] Nothing could more humiliate a man than to have the passions of another man vomited out upon him, to be left with his despicable progeny thinking it was his own, and above all to become thereby the butt of ridicule of his injurer. The passage may, perhaps, only illustrate Philo's familiarity with the history of law, but suggests that we may possibly have here the lost Ptolemaic conception and treatment of adultery (p. 80). Of this we cannot be sure, for in Ptolemaic law there has been no satisfactory parallel found to the Athenian

[19] *De Decal.*, 126. [20] *Ibid.*, 129.
[21] Vinogradoff, *Hist. Jurisp.*, II, 174.

γραφὴ ὕβρεως; but again Philo seems to give an unmistakable finger-post. That Philo classed adultery as ὕβρις deliberately is made clear from his making ὑπογάμιον also ὕβρις. Ὑπογάμιον, infidelity to a ὁμολογία γάμου, Philo regarded as a form of adultery, and twice called it ὕβρις (p. 96). Here again as for adultery he asked for stoning, so that the word ὕβρις must have meant more to him than simple assault, though he uses it in that sense also.

Philo's use of ὕβρις in the Alexandrian sense of simple assault, or in what Hitzig considered its essential meaning, physical violence, is to be found in his remarks on the case of the woman who, to protect her husband, seizes the genitals of a man attacking him (pp. 130 f.). The attack on the husband is itself described as ὕβρις from which the wife wants to deliver him; but she must watch out that the violence of her emotions do not run away with her so that she be guilty of a more serious ὕβρις than the man who is attacking the husband (III, 173). That the word means physical assault to Philo is made perfectly plain in the passage by his calling the blows which boxers give each other ὕβρις (§ 174). But the penalty is adjudged in this case specifically for the woman's extreme θρασύτης, and for the crime Philo uses the word καταθρασύνοιτο in a unique way. The woman has committed θρασύτης against the man. One would be tempted to suspect that θρασύτης was a distinct legal form of ὕβρις if it were not obvious that Philo is throughout very ill at ease in discussing this law, and so may be using a term of moral rather than legal meaning.[22] For the law

[22] I have noted three other passages where the word is used of crime. In III, 64 (see above, pp. 90, and 236) the term is used along with βία, ὕβρις, and ἀκολασία to denote the crime of raping a widow; in III, 66, it describes action inspired by evil lust, specifically a man's not controlling his desire for a virgin long enough to go to her guardian and arrange a marriage; in IV, 2, it is used of highway robbery as a descriptive term

was apparently one which the Jewish courts kept alive in spite of the fact that it by no means fitted into the principles of procedure recognized by the Greeks. For in all Greek procedure self-defense was recognized as an adequate plea, and in actions for ὕβρις or αἰκεία the question was always as to which man had struck the first blow. The man who did that was responsible for all that followed.[23] No Greek court would have condemned a woman who did what she could to help her husband when he was really in serious danger. Further, the penalty, cutting off the woman's hand, was a scriptural penalty unheard of in Greek actions for ὕβρις, or for any sort of assault, and so Philo finds it impossible to state his law in any way satisfactory to Greeks. That he was quite aware that his definition and defense of the Jewish law were juristically weak is made plain by the fact that he goes on further to defend it with allegory. But if the application of the term ὕβρις is uncertain, one of its meanings for Philo has come out very clearly in what he says. The word has never lost its sense of bodily assault.[24] It is interesting also to see how the Jews held to whatever part of the law of the Torah they possibly could. The Greeks and Romans would not have sympathized with this law and its penalty, but would hardly have interfered if it meant much to the Jews as a part of their sacred tradition.

after the crime has been discussed and classified as being κοινός, or under Roman jurisdiction. Without further evidence one could not conclude that it was the name for any particular legal procedure.

[23] Hitzig, *Injuria*, pp. 4 ff. For Ptolemaic law see Taubenschlag, *Strafrecht*, p. 18. Partsch, in *Archiv*, VI, 58 f.

[24] See also Philo's argument that the son who has struck his father ought not be punished by losing the offending hand: τὴν γὰρ ὕβριν οὐ χεῖρες ἀλλὰ διὰ χειρῶν ὑβρισταὶ δρῶσιν. *Spec. Legg.*, II, 245. See above, p. 74. Allegorically, but correctly, he calls a man's usurping of God's prerogatives ὕβρις μετὰ βίας; *Conf. Ling.*, 117.

Philo's treatment of assault is as complicated a subject as any, for the law of assault had remained not purely Jewish, as was the case with many of the religious laws, nor yet had Jewish tradition been abandoned for a foreign legal system as was the case in the law of murderers and extreme robbers. Rather is it a careful attempt to fit the letter of Jewish law into the still largely undisturbed Ptolemaic conceptions of assault which were in force in Egypt, in which attempts at adjustment the letter of Jewish law tended often to force the Greek conceptions out of their true meaning. As he uses the terms, ὕβρις now more resembles the ancient Greek crime, and is punished with ἀτιμία of death, and again is only the current Alexandrian crime of that name, punished with a fine. Βία except when used to translate the Roman *vis*, is used with clear understanding of its meaning in Alexandria, and whenever possible is appealed to as a principle behind Jewish law. But the fact that Philo is treating only the specific laws of the Torah keeps him from discussing directly these principles of Greek law which he clearly had in mind. In cases where the Jewish law was not specific, Philo and his courts would unquestionably have followed the Ptolemaic law of assault.

Philo's laws for sexual irregularities are very interesting. Adultery, as has been seen, was taken over by the Roman courts, probably because it so frequently involved the death penalty by provincial laws. Similarly Philo appeals to a principle of Roman law, the *Lex Julia*, in calling a husband's condoning of his wife's adultery pimping, and so worthy of the death penalty, though this is a more severe treatment than the crime would have received by Roman law at this time (p. 85). Incest is regarded with horror, and is defined to include marriage with the whole list of prohibited relationships of the

Torah. But while Philo is obviously sincere in his hatred of the crime, he has no penalty to suggest except the vengeance of Nature (pp. 82 ff.). I have suggested that the crime may possibly have been left to the Romans, who in general treated it very severely,[25] but the absence of penalty, in spite of the agreement of Philo's remarks with Plato and Socrates, is really anomalous.

Paederasty or sodomy, and human commerce with animals are crimes which Philo calls *κοινός*, and which are accordingly to be followed by the immediate lynching of both parties (pp. 86 ff.). He even demands lynching for female prostitutes, and I have suggested that strict Jews may have tried to enforce such a law, though it could hardly have been invariably enforced even by a people so strict in their standards of sexual morality as the Jews proverbially were (pp. 88 f., 99).

Divination and magic, to which Jews devoted themselves with considerable success, were regarded with suspicion by their courts. Philo says that Moses forbade all recourse to diviners (pp. 37, 186 f.), but states no penalty. Magic, however, was sharply divided into two classes, the good or true magic, and the perverted magic. Practitioners of the latter were regarded as a danger to society, to be dealt with by the most summary of all procedure, lynching (pp. 109 ff.).

In Philo's discussion of crime two words of primarily religious significance appear. *Ἱεροσυλία*, the term in Greek law for sacrilege in the form of robbery or defamation of a sacred place or image, Philo uses figuratively but accurately to describe murder (p. 100). But there is no indication that it had any importance as a part of Jewish practice. The other term, *ἀσέβεια*, appears most interestingly as the criminal aspect of breaking an oath, a gen-

[25] Mommsen, *Strafrecht*, pp. 682 ff.

eralization from the fact that perjury against the ὅρκος βασιλικός in Ptolemaic (and presumably Roman) law in Egypt was described by that name (pp. 179 ff.). In a list of crimes in one of Philo's philosophic writings it is conspicuous that he puts them in the order ἀπάτη, ψευδολογία, ψευδορκία, ἀσεβεια, etc.[26] Similarly all diviners are guilty of ἀσέβεια (I, 62). But the term appears more particularly to be the name for all crimes against religious and peculiarly sacred laws of the Jews. So apostasy from Judaism is plainly to be understood as ἀσέβεια (pp. 33 ff.); the worship of Gaius by Jews would have been ἀσέβεια.[27] It is ἀσέβεια to make idols.[28] In this sense of impiety and false worship, or failure properly to respect deity, the word is very common in Philo.[29] As such the penalty he asks or looks for is usually death. For the apostates he urges lynching (p. 33, n. 7); upon the Romans who tried to persuade the Jews to worship Gaius he points out that God brought terrible calamities and death;[30] Pharaoh's drowning was δίκην ἀξίαν τῆς ἀσεβείας;[31] but for the Israelites' ἀσέβεια in not believing God and going into Canaan at their first opportunity the penalty was the forty years' wandering.[32] Yet much less serious crimes are called ἀσέβεια, as for example cooking a lamb in its mother's milk,[33] and certainly the Jews could not have enforced their kosher laws with the death penalty. It is possible that there was a regular form of

[26] *Sacrif. Ab. et Cain.*, 22.

[27] *Leg. ad Gaium*, 206, though the Roman accusers of the Jews before Gaius called the Jews' refusal to sacrifice to him by the same name: *ibid.*, 355.

[28] *Ebrietat.*, 109 f.

[29] *De Decal.*, 75; *Confus. Ling.*, 152, 155; *Virtut.*, 34, 94. See Leisegang, *Index*, *s.v.*

[30] *Leg. ad Gaium*, 206.

[31] *Ebrietat.*, 111.

[32] *Vit. Mos.*, I, 237. The murderer commits ἀσέβεια, *Spec. Legg.*, III, 84, 90.

[33] *De Virtut.*, 144.

action by Jewish law, the γραφὴ ἀσεβείας; for such an expression appears,[84] but in a philosophic passage where one cannot be certain that Philo is not talking figuratively. The expression, and his use of the term, may reflect a regular procedure in the courts, which was in any case serious, else it would have been called δίκη not γραφή, but which would probably have been penalized in proportion to the offense. The evidence, to be sure, is again only suggestive, but the suggestion has great verisimilitude. The details of the Jewish religious law have not been included in this study because their interest is rather for the historian of religion than of law. Enough was included, as for example the treatment of the temple-oaths (pp. 45 f.), to make it appear that Philo is speaking of the religious law as it was in active observance in his own day in Alexandria. An interesting adaptation of religious law to Alexandrian life appears in the insertion into the Jewish code of a law unknown to the Torah requiring the Jews to treat the gods and idols of their neighbors with at least formal respect (p. 48). The law is of great significance in indicating the attitude which the Jews had to take toward the civilization in which they lived.

When one comes to the question of the Jewish law in its provisions for legal procedure there is a sharp distinction between crimes over which the Jews might have jurisdiction, and those which the Romans reserved for their own courts, and which accordingly could be treated by Jewish procedure only extra-legally. Philo has made it clear that his courts had no proper jurisdiction over murderers of the more serious types, though crimes which he classes as murder, the killing of one's own slave, and infanticide, were tried by Jews, and the people convicted

[84] *Poster. Cain.*, 38.

either sentenced subject to Roman approval of the sentence, or lynched. The poisoner was to be lynched, but the defense of execution is indicated in terms of Roman law (pp. 104 ff.). Justifiable homicide was defined according to Roman law (pp. 121 f.), while the use of asylum by murderers was restricted according to Roman ideas (p. 103). Similarly the highwayman or any robber by violence fell under Roman jurisdiction; the Jewish law of killing a thief in the house was developed under Roman inspiration (p. 154). Sexual crimes of the major sort, adultery, pimping, and probably incest, were treated by Roman law, in the Roman courts if treated legally, while the defense is indicated in terms of Roman law if Jews took the matter into their own hands. For several of these crimes Philo uses the word κοινός, which, while it was not invariably used by him for such crimes, seems to have been the distinguishing term for crimes reserved for Roman procedure. Several crimes, if this were the word for Roman trials, which we should have expected him to call by that name, as murder, for example, he does not call so, while one crime, prostitution, to which the Romans must have paid little attention, was also called by that name. In this case Philo seems to have been using figuratively a word of dire sound to denounce a crime, hated by the Jews, but tolerated by the other inhabitants of Alexandria. But the presence of Roman law is so striking in connection with the other crimes he calls κοινός that in spite of his application of it to prostitution it seems that the term may be assumed to indicate cases demanding Roman treatment as *crimina publica*. In other crimes appeal is made to Roman law to strengthen the Jewish traditional position. The law of honoring parents is clearly developed with the Roman *patria potestas* in mind; to strengthen the Jewish attitude toward bad

magicians he brings out in bold relief an act of Moses which must vividly have reminded the readers of a recent similar act of the Roman Senate (p. 38). The element of carelessness in damages recalls the Roman *culpa*, but might have been an independent development. False witness, however, is developed on Roman lines throughout, probably because the Greek conceptions were so far from expressing the Jewish feeling toward the crime, and probably, also, to add dignity in Roman eyes to Jewish standards of court procedure (pp. 176 ff.). The influence of Roman law and procedure is markedly present, then, in a way to coincide with what we know from other sources of the Roman jurisdiction in Egypt at the time. In two matters he criticizes Roman law, one for being too lenient with the son who struck his father (pp. 74 f.), for here was a matter where the Jewish law in Alexandria was very strict, and the other for being represented by officials too amenable to bribery (pp. 195 f.).

In matters which fell below this line of Roman preoccupation Jewish procedure was of two kinds, which might be distinguished as cases in common law, and in ceremonial or religious law. In contrast to the κοινός Roman procedure, this sort of case may have been called ἴδιος (p. 149). In common law of this level the influence of the centuries of Greek environment is just as conspicuous as was the Roman in its own field. But the Greek law is better assimilated into the Jewish procedure, and shows less signs of having been suddenly thrust upon the Jews to the exclusion of their own traditions. In such matters as the household hearths used for asylum for slaves (p. 54), in the law bidding respect for the gods of one's neighbors (pp. 47 f.), one sees Greek ideas which the Jews had to accept, and which could never be given a Jewish coloring. But in oaths (pp. 41 ff.), in the pro-

cedure for rape and assault (pp. 89 f., 232 ff.), in the conception of the legal nature of accidental homicide (p. 117), of deposits (pp. 164 ff.), in the law of inheritance (pp. 56 ff.), and in the ideals of correct court ethics and procedure (pp. 189 ff.), Greek standards and laws have come into the Jewish law to round it out and complete it. The Roman law was less assimilated to the Jewish law because in major crimes the Jews had to turn their criminals over to the Romans, or else defend their own extralegal procedure before Roman criticism. The Jewish law in those matters became suddenly a dead letter. But in the fields where Jewish tradition was still a living law in the courts, and in which, for the most part, Greek procedure was still the law used by the rulers of Egypt, the Jewish law shows that it had gradually allowed itself to be corrected and amplified from Greek practice, but had never lost its identity in the process. Greek influence seems most importantly to have been felt in the classification of crimes, and in the form of procedure. The influence here was probably much more extensive than Philo indicates, since he has artificially reclassified the laws under the Decalogue, and has discussed for the most part only those laws specified in the Torah, and so has obscured the Greek classification which from his terminology seems to have been the real basis of Jewish procedure in those matters. What few laws Philo quotes not immediately inspired by the Mosaic code have come to us only because of his inveterate habit of digression. The fact that he has mentioned even these, in a treatise dedicated to expounding the legal validity of the Torah, suggests that a treatise on the same system of Jewish law which took a different point of departure from Philo's would have revealed vastly more Greek law than he does.

Of Jewish courts Philo indicates several. First, above

all Jewish courts in Egypt, was the Great Sanhedrin in Jerusalem. One action, that of suspected adultery, seems to have been reserved for hearing at that court, prior to the use of ordeal in the temple (pp. 80 f.). Apparently the matter would have been heard in Egypt, and if the evidence was not adequate for a decision, or the decision was unsatisfactory to the suspicious husband, he could appeal to Jerusalem to the Sanhedrin, and then appeal from that court to the ordeal at the temple, the immediate judgment of God. Whether this carrying of litigation to the Jerusalem Sanhedrin was possible in other sorts of action we do not know.

The highest Jewish court in Egypt which Philo mentions is ἡ γερουσία πᾶσα, to which he specifies that the charge of fraudulent misrepresentation of a daughter's virginity should be brought.[35] The fact that he specifies πᾶσα in this case suggests that the γερουσία might meet in other than plenary session, divided into sections for periodic respite, or to hear different sorts of cases.

It is possible that as the temple ordeal stood above the Jerusalem Sanhedrin, there was a similar court in Egypt, the θεῖον δικαστήριον, to hear the ordeals by oath, which corresponded to the court of the "seven judges" of Josephus which heard similar cases (p. 167). Oaths were used for different sorts of trials, particularly in cases where the receiver of a deposit was unable to restore the goods left with him because they had disappeared without trace. An oath of innocence of any fraud, when taken by the receiver before the "divine tribunal" satisfied such a case entirely. But that all juridical oaths must be heard by this one court is by no means certain, for in all cases where evidence seemed to the court inadequate appeal to the ordeal of oath was freely recommended (p. 186). Oaths

[35] III, 80; see above, p. 98.

used thus in place of evidence Philo calls ἄτεχνος πίστις, and apparently trials were frequently conducted in that way since Philo says that every false accuser would be a perjured man because, lacking evidence, he would have been forced to use this method of presenting his case. Fortunately in discussing deposits Philo has preserved a juridical oath. It was taken "by God," with hands raised to heaven, and in Greek form the person taking the oath called down upon himself the most frightful calamities in case the statements he was making were not true (p. 167). Perjury seems to have been actionable in Jewish law, for all perjury is called ἀσέβεια, while in Greek and Roman law that term was reserved for infractions of the legally protected ὅρκος βασιλικός (pp. 179 f.). So as Romans, and probably Greeks before them, penalized perjury by the ὅρκος βασιλικός with scourging, in like manner, while Philo and strict Jews preferred the capital penalty for perjury, lenient Jews sentenced to scourging. Philo's preference may reflect an older, and strictly Jewish, penalty which was being softened under gentile influence. In discussing the oath in general, Philo says that it is to be taken fearlessly though not frivolously, and if possible not in the name of God. Apparently this statement does not refer to juridical oaths in the Jewish courts, which would hardly have required that particular oath, but to dealings with Gentiles who might want to be sure of an assertion from a Jew and so demand an oath by the sacred name, knowing how extremely reluctant a Jew would be to perjure himself by such an oath. Ordinary oaths, Philo says, might better be taken by one's parents, or by such a lesser divinity as Nature, the Earth, the Sun, or the Heaven, or it might be taken in the Greek elliptical form, "By the ——" (pp. 41 ff.). Apparently perjury by such oaths as these was always actionable, and it is in

connection with these oaths that he states the penalty above mentioned (p. 46).

In connection with actions for rural property damage Philo speak of an ἀγρονόμος, who corresponded to the ἀστυνόμος in the character of his jurisdiction, and whom every properly organized πόλις included among its officers (p. 159). No mention of such an officer has appeared among the papyri, and I have concluded that the reference is in both cases probably to Jewish officials who regulated suits for damage to property, including, apparently, damage done by domestic animals. One might also infer that there was a regular Jewish ἀγοράνομος in the Jewish quarters of Alexandria, since Philo specifically says that wage disputes are settled by such an officer according to Jewish law (p. 210).

All judges took an oath of office,[36] by which they swore to give the true decision, and the courts, if we may judge from Philo's exposition, were conducted with high standards of integrity (pp. 184, 189 ff.). Fees were not allowed for decisions, and personal predilections were to be given no consideration whatever, whether those personal considerations were personal enmity or friendship, or were the allowing for the litigant's wealth or his wretchedness. The judge's decisions were to be based upon two things only, the evidence and the law, though the latter is not to be taken in a slavish fashion when its letter would work injustice. The Jewish judge, like the Greek, was by his training, character, and official integrity to be a radiating center of God's justice, mercy, and rulership, and so a saving tonic in all society.

Evidence itself was carefully studied. The judge's training must include both logic and rhetoric to enable

[36] *De Decal.*, 141: *οὐ γὰρ ἀνωμότοις δικάζειν ἔθος, ἀλλὰ μετὰ φρικωδεστάτων ὅρκων.*

him to analyze accurately and speak without ambiguity. Several of the criteria for decisions specified by the Torah were rejected for a more rational sort of evidence and decision. So rape in the city was by the Torah to be adjudged as always done with the girl's consent, that in the country against her will. This Philo refutes as fallacious, Torah or no Torah (p. 97). Evidence that a bride had presented herself a virgin was stated by the Bible to be the blood-stained garments of the bridal night, but this Philo properly ignores, and simply asks for proof of virginity (p. 98). Hearsay evidence was strictly prohibited (pp. 193 f.), and the judge was warned against the sophistry of advocates (p. 194). Trials were conducted on the basis of documentary evidence, as interpreted by legal precedent (p. 186), but when documentary evidence was lacking, and only then, witnesses were called in. These took no oath. Philo is elaborate in his argument about the criminality of false witness, but gives no clue as to either procedure or penalty for the crime (pp. 183 f.). It seems fairly certain, however, that the Jews regarded and treated it as a very serious offense. Philo says that he regarded it as more reprehensible than false accusation (IV, 42), of which we also do not know the Jewish treatment.

The form of procedure, judging from Philo's free use of Greek terms, probably was similar to the Greek forms. In one case, when a man was killed by falling into an unprotected pit, a case not covered in the Torah, Philo states that action was brought by the relatives (p. 129), which might have been a conclusion from either Greek or Jewish customs. In general it was the man injured who brought suit, if he were alive to do so, even, apparently, in case of theft. For Philo mentions no public prosecutor, and apparently the Greek form of bringing suit is what

he has in mind. There was some sort of police system available in the daytime, but at night every man had to be his own policeman and judge.

Penalties show themselves in many cases adjusted to the standards of the Greeks, though Jewish penalties, when stricter than the Greek or Roman penalties, frequently held on, as in the cases of the prostitute and the apostate. But the old Jewish, as well as the current Greek and Roman, collective and substitutionary penalties, whereby a man's family suffered with him or for him for a crime of which he alone was guilty, were rejected altogether (p. 134). Only the criminal himself might be penalized. Complicating circumstances must be taken into consideration in adjudging penalty. As a principle of penalty he wishes to follow the *Lex Talionis* as far as possible, not literally, but in putting corporal penalties upon corporal crimes, and fines upon property damage (pp. 135 ff.). But he admits that the principle cannot always be followed, and in the specific penalties he names, the Greek penalties of fines for assault, etc., are freely followed.

The penalty of death, which was formally reserved for Roman execution, might be administered by the Jews in two ways. For crimes which the Romans did not regard as capital, that is for apostasy (pp. 34 f.), speaking the secret Name of God (p. 48), blasphemy (pp. 34 f.), striking a parent (p. 74), buggery with animals (p. 87), infanticide (pp. 115 ff.), killing one's own slave (pp. 121 ff.), in all these cases lynching is called for without reference to any tribunal, and since we know of cases where several such offenses were so treated (p. 25), there is no reason in my opinion for doubting that the Jews did execute these penalties. In some of these cases, as in the law against striking a parent, and the odd law of a man

who takes back his wife after divorcing her (p. 85), justification of the penalty is indicated according to Roman law, by which Philo is apparently showing the plea which would have been entered either for a ratification of the Jewish sentence, or in defense of those who had lynched the offender if there was a Roman protest. In several other crimes lynching, or Jewish execution, is called for when the matter would properly have fallen under Roman jurisdiction. This is specified in the case of the unfaithful betrothed girl and her illicit lover (p. 94), paederasts and the like (p. 86), poisoners and practitioners of evil magic (pp. 104 f.). The first is tried and executed, according to Philo, by Jewish procedure, and it may well be that since the act was not technically adultery, but only judged so by Jewish standards, the Romans allowed the trial to be heard by the Jews, and only asked that the sentence be ratified by Roman officials before it was executed. But that extreme criminals were actually taken in hand by the mob in the period is witnessed beautifully in the traditional Gospel story of the woman taken in adultery, who was simply going to be taken out and stoned according to the law of Moses by the crowd which had caught her in the act. Technically, of course, she should have had a Roman trial, but the story gives no hint that this technicality was any inhibition on the actions of the mob (p. 89, n. 43). A splendid case of the Roman assent freely given to a Jewish death sentence is that of Jesus as the story appears in the Gospel of Mark.[37]

It will be recalled that Juster argued that Philo's asking for the death penalty in his legal system made it impossible that the law he indicates could have been in use in Jewish court under Roman rule (pp. 23 ff.). Far from that's being the case the way in which Philo does call for

[37] See especially 14. 64; 15. 1, 15.

the death penalty, the frequent appeal to Roman principles, the rejection of Roman supervision as a check upon Jewish lynching for ritualistic and religious offenses (pp. 34 ff.), coupled with the obvious abandonment, in most cases, of major crimes to Roman procedure, all these are in most striking agreement with what we know from other sources of Jewish life under Roman rule, and together they constitute what seems to me to be one of the most striking confirmations of my hypothesis. It is unfortunate that Philo's apologetic inversion of his thought processes has limited him to defending the Torah with its provisions, and that as a result the large body of laws which the Jews must have enforced which were not in the Torah are represented only by casual digressions which Philo, fortunately, could not resist. And it is unfortunate that he has confused the classification of laws which Jewish lawyers must have made by his scheme of putting all laws under the Decalogue. But we must be thankful for what survives: for it is one of the most comprehensive pictures of a legal practice which we have of any people from that period.

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